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# The Loss and Damage Review

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By

**HERBERT C. LUST**

Author: "SUPPLEMENTAL DIGESTS OF DECISIONS UNDER THE INTER-  
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**THE  
LOSS AND DAMAGE  
REVIEW**



## CHAPTER I.

### CONTROL AND REGULATION OF CARRIERS.

1. **Federal Legislation.** The liability of a carrier for damages to an interstate shipment of freight is covered by the Interstate Commerce Law, as amended, and the common-law rules applicable thereto as accepted and applied in federal tribunals must govern<sup>1</sup>. It must be remembered that from December 28th, 1917, to March 1st, 1920, carriers were under Federal control, and that to some extent there was a conflict between the Federal Control Act and certain provisions of the Interstate Commerce Act. As a result of Federal control the Director General of Railroads issued various orders among which was one known as General Order No. 43 to the effect that garnishment and attachment proceedings could not be brought against carriers while under Federal control, and prevented the attaching of carriers' physical property. This order was held unauthorized by one of the New York courts, in a very well considered decision, *Salant v. Pennsylvania R. R.* 177 N. Y. S. 475 where the court said, p. 478: "The Federal Control Act provides: 'Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as it may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law, or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. \* \* \* But no process, mesne or final, shall be levied against any property under such federal control.' To understand the limitations of the words 'federal control,' reference should be had to the first section of the act (section 3115 $\frac{3}{4}$ a), which states: 'That the President, having in time of war taken over the possession, use, control, and op-

1. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454

eration (called herein federal control) of certain railroads and systems of transportation (called herein carriers) \* \* \* . It is clear that this section of the act relates only to the operation and control of the railroad systems and the property engaged directly as an instrumentality of such operation, on the ground that it was necessary to enable the government to transport troops, munitions, and supplies. Only so far as such necessity justified the use of the war power of the government could the same be sustained under the Constitution. In all other respects the laws of the states were left in full operation. To hold that the lawful owner of goods could not take them by judicial process, because at the time they happened to be under federal control, not for government use, but merely for transportation for hire, would violate the provisions of the federal Constitution that no person shall be deprived of his property without due process of law. Nor can Congress deprive the citizens of this country of the right to resort to the courts, which have been established by the several states to prosecute or defend actions and suits, according to the established usage and practice, in accordance with the law of the land. See *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *Ochos v. Hernandez*, 230 U. S. 139, 161, 33 Sup. Ct. 1033, 57 L. Ed. 1427; *L. N. Dantzler Lumber Co. v. Texas & P. Ry. Co.* (Miss., March 1919), 80 South 770." Of course as to interstate transportation of goods, the laws of Congress and the decisions of the United States Supreme Court are, so far as applicable, binding.<sup>2</sup> In a recent case it was held a prospective operation must be given to the clause in the Cummins Amendment of August 9, 1916, to the Interstate Commerce Act to the effect that the declared liability of a carrier for actual loss shall

2. *Burke v. Union Pac. R. Co.* (N. Y. 1919), 124 N. E. 119.

Where a racing mare was shipped by rail from Illinois to Wisconsin, the provisions of the Carmack Amendment to Interstate Commerce Act applied thereto. *Basset v. Chicago & N. W. Ry. Co.* (Wisc. 1919), 171 N. W. 749.

Since the enactment of the Carmack Amendment all questions relat-

ing to a common carrier's liability for loss or damages to interstate shipments are to be determined thereunder and by rules declared by the federal court that legislation having superseded all regulations of a particular state upon the subject and decisions prior to that time are not controlling. *Fay v. Chicago, R. I. & P. Ry Co.* (Ia. 1919), 173 N. W. 69.

not apply to contracts of limitation authorized by order of the Interstate Commerce Commission and that such proviso or exception does not apply to the Commission's orders issued prior to the amendment of March 4, 1915.<sup>3</sup> The importance of this decision cannot be overestimated. The Cummins Amendment states that its provisions invalidating limitations of liability shall not apply to property "concerning which the carrier shall have been or which shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property \* \* \* ." There have been a few exceptions such as the case of live stock where the Commission had authorized released rates prior to the passage of the Cummins Amendment. It had quite generally been thought that the Cummins Amendment ratified such released rates, but under the decision above quoted it seems that carriers seeking to rely upon such previous order of the Commission as authority for the filing of released rate tariffs are in error and must get specific authority for such rates *de novo*.

**State Legislation.** While Congress has exclusive power to regulate interstate commerce, and the state may not, when Congress has exerted that power, interfere therewith, even in the otherwise just exercise of its police power, the state may in such a case act until Congress does exert its authority, even though interstate commerce may be incidentally affected.<sup>4</sup>

**Who are Common Carriers.** An automobile may be so used as to become a "common carrier" in interstate commerce.<sup>5</sup> A public truckman, trucking goods under a contract making his responsi-

3. *Western Assur. Co. v. Wells Fargo & Co.* (Minn. 1919), 173 N. W. 402.

4. *State v. Atlantic Coast Line R. Co.* (Fla. 1919), 81 So. 498.

When, in the absence of federal regulations, state supervision of matters that incidentally affect interstate or foreign commerce is permis-

sible the state authority is dominant; but upon the assertion of paramount federal authority, state regulations in the premises are thereby excluded. *State v. Atlantic Coast Line R. Co.* (Fla. 1919), 81 So. 498.

5. *United States v. Simpson*, 257 Fed. 860.

bility for goods that of a carrier and bailee for hire, was liable for loss of goods, on theft of truck and goods from line of waiting trucks at freight depot, while the driver had gone into station for four or five minutes, having been, as common carrier, insurer against all losses, except those arising from acts of God or the public enemy, or public authority, or the shipper, or losses caused by inherent nature of goods.<sup>6</sup>

6. Sullivan v. Williams, 176 N. Y. S. 710.

Truckman, who was bailee for hire of goods, was liable for loss of goods stolen, with truck, from line of wait-

ing trucks at freight depot, as result of driver's failure to guard truck. Sullivan v. Williams, 176 N. Y. S. 710.

## CHAPTER II.

### BEGINNING OF LIABILITY.

**Delivery to the Carrier. Transfer of Title.** Where goods are sold f. o. b. certain station, seller's delivery to carrier at such station constitutes delivery to buyer, and buyer is liable for full purchase price, regardless of damage to goods in transit.<sup>1</sup>

**Holder of Bill of Lading.** One who merely had custody of an order bill of lading for another without right of property or interest in it or control of it or right of possession beyond its safe-keeping was not the "holder" of such bill within the federal Uniform Bills of Lading Act, § 42 defining the term holder.<sup>2</sup>

1. *Standard Boiler & Plate Iron Co. v. Brock* (S. E. 1919), 99 S. E. 769.

Where claimant delivered material to another to be manufactured into shirts, the contract was one of bailment, termed in the Roman law a "locatio operis faciendi," and title to the material remained in plaintiff. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475.

Where material for shirts was cut in forms and sent to another to be manufactured, materials added by the bailee in performing his contract became by accession the property of the bailor; the bailor having furnished the principal portion of the materials, and that furnished by the bailee being accessorial merely. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475, 476.

Under the federal Bill of Lading Act and Personal Property Law N. Y. § 210, the owner of shirt materials, who had delivered them to a bailee for manufacture under a contract providing for return and for payment on the week following de-

livery after completion, may replevy such materials from carrier, though the bailee shipped them on an order bill of lading, which was attached to draft, and the bill was not surrendered to the carrier nor impounded by a court, for the bailee could not pass title to a purchaser in good faith, and his sending the goods on an order bill of lading came perilously near to being larceny. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475, 476.

2. *J. F. French & Co. v. Pere Marquette Ry Co.* (Mich. 1919), 171 N. W. 491.

Oral negotiations are merged in and supplanted by a written contract afterwards entered into between the parties covering the same subject. *Chicago, M. & St. P. Ry. Co. v. Jewell* (Wisc. 1919), 171 N. W. 757.

In the year 1916, a California shipper delivered to a carrier goods for transportation to Hutchinson, Kan. The carrier issued to the shipper an order bill of lading, with a notation to notify a Hutchinson dealer. The

shipper drew drafts on the dealer, attached to them the bill of lading properly indorsed, delivered them to a bank, and received credit on its checking account with the bank for the face of the drafts. The bank expected to charge interest during the suspension period, and to charge back the drafts in case of necessity. The drafts were dishonored. The dealer sued the shipper for damages for breach of contract, and attached the goods while in possession of a terminal carrier at Hutchinson, and garnished the terminal carrier. The bank replevined the goods. After obtaining possession of the goods, the bank, at the request of the shipper, delivered the bill of lading to the terminal carrier, and the shipper diverted the goods to Philadelphia, Pa. The dishonored drafts were returned to the shipper, who delivered to the bank new drafts on the Philadelphia consignee, but received no credit for them. The attaching dealer intervened in the replevin suit, and set up the attachment and garnishment proceedings. *Held*, negotiation of the bill of lading by the shipper vested in the bank title to the goods and right of possession. No attachable interest remained in the shipper, and the attachment being barren, the dealer had no standing to require the bank to account for the goods, or any excess in value over the face of the original drafts. *Farmers' & Merchants' Nat. Bank v. Sprout* (Kans. 1919), 179 Pac. 301.

Bills of lading are prima facie contracts of both carriage and delivery, and carrier must ordinarily deliver only in accordance with bill of lading. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

Consignee in bill of lading is presumptively owner of goods, and must be treated by carrier as absolute owner until it has proper and valid notice to contrary, and a delivery to him without such notice will discharge carrier. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

An indorsement of a shipping receipt transfers title to goods. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

The insertion of the figures and letters "against 214 B/C" in the face of a draft, to which was attached a bill of lading for 214 bales of cotton, did not destroy its characteristics as a negotiable instrument in Louisiana or New York where the Uniform Negotiable Instruments Law was in force, being merely indicative of a particular fund out of which reimbursement was to be made. *Hubbard Bros. & Co. v. Southern Pac. Co.* 256 Fed. 761.

The mere fact that a railroad had previously delivered cotton to a buyer on forged bills of lading does not prevent the railroad from recovering from such buyer the value of the cotton delivered on a forged bill of lading purporting to have been issued by a connecting carrier, on the ground that the buyer was misled by the negligence of the railroad. *Hubbard Bros. & Co. v. Southern Pac. Co.* 256 Fed. 761.

A common carrier can recover against one who receives goods upon a forged bill of lading purporting to have been issued by an agent of another carrier; the law fixing liability resulting from such a bill of lading not undertaking to make each of the agents of all the lines an agent of all of the connecting lines. *Hubbard*

**Destruction Before Transportation.** A carrier's liability with respect to freight presents two aspects, that of an insurer and that of a warehouseman. The difference between the two phases of its liability are very marked. When it holds goods as a carrier it is an insurer, and it is liable for any loss, except due to some one of the excepted causes, as an Act of God, but when it holds goods as a warehouseman, it is only liable for any loss

*Bros. & Co. v. Southern Pac. Co.*, 256 Fed. 761.

Where a cotton dealer sold cotton and drew on the buyer, placing the true bills of lading as collateral with a bank, and sending to the purchaser a forged bill of lading, which the latter presented, obtaining the cotton, the buyer should be considered an equitable assignee of the seller and is entitled, on recovery by bank of judgment against the railroad for conversion, to any balance after payment of secured debt. *Hubbard Bros. v. Southern Pac. Co.*, 256 Fed. 761.

Ordinarily the drawee of a bill of exchange must determine at his peril the genuineness of the signature of the drawer, and, if the ostensible maker of a forged note pays the note, he cannot recover the amount. *Hubbard Bros. & Co. v. Southern Pac. Co.*, 256 Fed. 761.

Where a railroad converted a shipment of cotton by delivering it on a forged bill of lading, a bank holding the true bill of lading as collateral may recover from the railroad the entire value of the cotton, with interest. *Hubbard Bros. & Co. v. Southern Pac. Co.*, 256 Fed. 761.

Where a shipment of live stock is interstate, the terms of the original bills of lading issued by the initial carrier cover the entire transportation and the liability of the initial

carrier, notwithstanding that new bills of lading are issued by the connecting carrier. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Tex. 1919), 212 S. W. 981.

The indorsement of an ordinary draft for collection does not make the indorser a guarantor to the drawee of the genuineness of bills of lading attached, nor of the quantity or quality of the commodity shipped. *Hubbard Bros. & Co. v. Southern Pac. Co.*, 256 Fed. 761.

Assuming that the mere insertion of the words "against 214 B/C" in the body of a draft could render it a conditional order on a particular fund, such could not be the case where, for a considerable time prior to the transaction, there was a running account between the drawer and the drawee, and at the date of the draft the drawer had a credit with the drawee, and no accounts were kept of particular shipments of cotton, the drawer having established a credit with his cotton business as a basis, and the drawee was reimbursed by and made a profit out of the cotton. *Hubbard Bros. & Co. v. Southern Pac. Co.*, 256 Fed. 761.

An order bill of lading, though negotiable, represents money, not property. *J. F. French & Co. v. Pere Marquette Ry. Co* (Mich. 1919), 171 N. W. 491.

if it has failed to exercise ordinary care.<sup>3</sup> But the carrier's liability as a warehouseman does not attach until the end of the transit. It cannot attach at the beginning, so if goods are tendered to it for transportation, and it receives them it makes no difference how long it holds them it is liable as an insurer, although the goods may be in its warehouse. It is the duty of a carrier to anticipate and provide for the reasonable requirements by prospective growth of its business.<sup>4</sup> So it is liable to a claimant if it fails to furnish sufficient cars with which to transport the products of a shipper and if he has shipment at the team track of the carrier, and it fails to transport the same when tendered to it, it is liable in damages for its failure to do so.<sup>5</sup>

3. A carrier's common-law liability is that of an insurer of goods shipped, while the liability of the warehouseman is based upon ordinary care. *Buften v. Southern Express Co.* (Mo. 1919), 212 S. W. 74.

4. *State v. Atlantic Coast Line R. Co.* (Fla. 1919), 81 So. 498.

5. Claimant brought suit for damages sustained by reason of the failure of the defendant, as a common carrier, to seasonably furnish cars to transport plaintiff's forest product to market. The court said:

"It appears from the evidence that a portion of the forest products was banked on a spur track called Wachsmuth spur, owned by a private corporation and used in connection with its private business, from which spur it was the custom to take out products so banked on cars furnished by defendant; and a portion was banked on defendant's own line of railway at a place called Russell's Crossing. Owing to the disrepair of defendant's line of road, and especially of its bridges, traffic was wholly suspended thereon from April 3 to May 12, 1914, while repairs were being

made. On May 18, 1914, the forest products located on the spur were burned by a forest fire in no way caused by the defendant. On the same date defendant's bridge No. 8 also burned.

"Two separate recoveries are asked in the complaint, one for the value of the products burned at the spur, and one for the loss sustained by reason of the decline in the market price of the products located on defendant's line while they were awaiting shipment. There is no dispute as to the amount of each element of damage if plaintiff is entitled to recover.

"Defendant claims it was insolvent, and that it made repairs with due diligence, and that the proximate cause of the destruction of the property by fire was not due to any act or negligence on its part. A jury was waived, and the court found as facts: (1) That the defendant railway company as a common carrier negligently failed to keep its road in sufficient repair to be in a condition to operate so as to haul plaintiff's forest products from the Wachsmuth spur before they were destroyed by fire on May 18, 1914, and before the bridge

called bridge No. 8 was destroyed on the same date; (2) that such negligence was the proximate cause of the burning of plaintiff's material on the Wachsmuth spur and the damage to plaintiff by reason of its inability to fill orders from Russell's Crossing before bridge No. 8 burned on the 18th day of May, 1914; (3) the plaintiff made a sufficient tender of shipment of the material to the railroad company both at the Wachsmuth Spur and Russell's Crossing.

As a conclusion of law the court found: "That plaintiff is entitled to judgment against the defendant for the sum of \$1,812.40 damages on its first cause of action, with interest therefrom from May 18th, and for \$2,948 on its second cause of action, without interest." From a judgment entered accordingly the defendant appealed. *Bell Lumber Co. v. Bayfield Transfer Co.* (Wisc. 1919), 172 N. W. 955, 956.

The Court held:

The findings of fact denominated as such made by the trial judge are set out in the previous statement. Introductory to such findings the judge says:

"Having heretofore filed a statement in detail of my findings on the evidence, which will supplement these findings, I make these conclusions of facts."

The only statement to which this can refer is the decision of the court found in the record in which facts are stated and discussed. Among such facts therein found are these:

"The defendant's superintendent knew in 1913 that the road was bad and bridges were deteriorating and badly in need of repairs, that the defendant lacked funds for making repairs, but that no effort was made

prior to the first of April, 1914, by the defendant to raise money with which to make repairs. It is not shown that the defendant lacked credit or was unable to obtain money for the purpose of making necessary repairs." *Bell Lumber Co. v. Bayfield Transfer Co.* (Wisc. 1919), 172 N. W. 955, 956.

The evidence sustains these findings as well as those contained in the findings of fact denominated as such. That being so, the argument of the defendant that it was insolvent, and hence it was not bound to perform an impossibility, namely, make repairs without funds, does not apply to the situation before us. Counsel has cited a large number of cases to sustain the proposition that a common carrier cannot be mulcted in damages for failing to perform the impossible. We need not inquire into the correctness of that proposition here, because it does not fit the facts of the case. It quite conclusively appears from the evidence that Mr. Wales stood ready to furnish funds for repairs upon being furnished reasonably accurate data as to their cost. The defendant did secure the funds from Mr. Wales and did voluntarily make the repairs, but, as the court found, it failed to make them seasonably. It is therefore liable to plaintiff for the damages resulting from a drop in prices of the forest products because of the unreasonable delay in transporting them. As we understand it, counsel for defendant does not controvert the conclusion of liability as to this cause of action if it was the duty of defendant to seasonably make repairs.

As to the cause of action founded upon the damages sustained by plaintiff by reason of the loss by fire of

its forest products, it is earnestly argued that defendant be held liable therefor because the delay in making the repairs was not the proximate cause of the loss. Many cases are cited by counsel to sustain this proposition. Upon examination, however, in so far as they are reasonably parallel they will be found to be cases where the loss sustained was as likely to occur where the goods would have been if seasonably transported as where they were awaiting shipment, or where the loss was the result of a contingency that could not reasonably be anticipated, or an act of God, so-called, relieving the defendant from liability, or where the loss occurring in transit was as likely to happen at one time as at another. The case of *Northwestern C. M. Co. v. Chicago, B. & Q. Ry. Co.*, 135 Minn. 363, 160 N. W. 1028, strongly relied upon by defendant, is a good example of the two latter classes. There flour was to be transported from Minneapolis, Minn., to Bellington, W. Va. It reached Columbus, Ohio, on March 19, 1913, and remained there in the railroad yards till March 25, 1913, when it was destroyed by an unprecedented flood. The court found unreasonable delay at Columbus, but held, adopting the federal rule, that the act of God, and not the delay, was the proximate cause of the loss. No doubt the correct rule was applied. The flood was as likely to happen to a seasonable shipment as to a delayed one, and the cause was unprecedented and one not to be reasonably anticipated.

The facts in the present case are quite different. Here the freight was lying in a place known to be subject to a greater fire risk than in transit or at destination. Logs lying in the

northern woods are in a hazardous place because of the prevalence of forest fires, and this hazard is greater in spring and fall than during any other season, owing to the absence of snow and green vegetation. The hazard is so great that, as the evidence shows, no insurance can be obtained on forest products so situated. This fact was known to both parties. Plaintiff early in April called defendant's attention to the danger from forest fires which the delay would occasion and urged speed in making repairs. It was therefore a danger that was anticipated. Proximate cause as defined in our law consists of two elements: First, a reasonably close physical causal connection between the negligence and the injury claimed as a result thereof so that it can be seen that but for the negligence the injury would probably not have resulted; and, second, that the negligence must be of such a character, or occur under such circumstances, that an ordinarily careful and prudent man may reasonably foresee that an injury to another may probably follow from it. *Deisenrieter v. Kraus-Merkel Malting Co.*, 97 Wis. 279, 72 N. W. 735; *Wolosek v. Chicago & Milwaukee E. Ry. Co.*, 158 Wis. 475, 149 N. W. 201. The latter is often called the element of anticipation, and, strictly speaking, characterizes negligence rather than causation, but is now too firmly entrenched in the definition of proximate cause to be removed therefrom. As applied to the facts in this case, the law of proximate cause may be thus stated: When it is reasonably probable that an injury from an anticipated source may result to another from a failure to perform a duty owing to him then the failure to perform such duty is

the proximate cause of an injury sustained through such probable anticipated source. Here it was known that the freight was exposed to the danger of forest fires, and that such danger was in direct proportion to the length of the delay. It was, of course, not certain that forest fires would occur there, but that is not essential. It is enough that it be anticipated that they may occur. *Deisenrieter v. Kraus-Merkel Malting Co.*, 97 Wis. 279, 72 N. W. 735; *Feldschneider v. C. M. & St. P. R. Co.*, 122 Wis. 423, 99 N. W. 1034. That was and should have been anticipated in this case. The court found but for the unreasonable delay of the defendant the freight would have been removed from its hazardous location, and would have reached its destined market, so we have the requisite physical causation, namely, that had it not been for the unreasonable delay, the loss would not have occurred. The conclusion reached is that the court properly allowed damages upon this cause of action also. *Bell Lumber Co. v. Bayfield Transfer Co.* (Wis. 1919), 172 N. W. 955, 956.

In suit for damages for loss by fire of wood awaiting shipment along defendant's railroad, the court erred in refusing a general affirmative charge requested by defendant, where plaintiff failed to prove his allegations that defendant promised him cars to transport the wood, and that relying thereupon he placed such wood along the tracks. *Manistee & R. R. Co. v. Rumbley*, (Ala. 1919), 81 So. 857.

A carrier not shown to be insolvent is liable to a shipper for damages resulting from a drop in prices of forest products tendered and awaiting shipment because of delay

in transportation owing to the fact that the road was being repaired, where the repairs were unnecessarily delayed owing to a lack of money, which the carrier could have procured if it had used due diligence. *Bell Lumber Co. v. Bayfield Transfer Ry. Co.* (Wis. 1919), 172 N. W. 955.

Where a shipper in spring placed forest products ready for shipment at a spur in the northern woods on a carrier's line, and more than a month later such products were destroyed by a forest fire, the proximate cause of the loss was the unreasonable delay of the carrier in repairing its road; it knowing that such freight was subject to great fire risk. *Bell Lumber Co. v. Bayfield Transfer Ry. Co.* (Wis. 1919), 172 N. W. 955.

In an action against a railroad company for the value of cotton destroyed by fire after having been loaded into one of its cars from the platform of a cotton compress company, to whom shipping instructions over defendant's line had been given, and while search was being made for one more bale on the platform to make the shipment complete, evidence held to sustain a finding that the compress company was defendant's agent for receiving and loading the cotton. *Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co.* (Tex. 1919), 212 S. W. 814.

Where shippers having 100 bales of cotton on the platform of a compress company, which was the carrier's agent for shipment, gave orders for their shipment, and after 99 bales had been compressed, inspected, and loaded into two freight cars, a fire destroyed the 49 bales in the second car before the remaining bale could be

This liability of a carrier exists even though no bill of lading had been issued for the goods.<sup>6</sup>

found and before the bill of lading was signed, there was a sufficient delivery of the cotton to the carrier for transportation to make its liability as a carrier attach at the time of the fire. *Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co.* (Tex. 1919), 212 S. W. 814.

A track placed by carrier on its own land for use and convenience only of shippers whose warehouses were adjacent thereto was a "private or other" siding within the Uniform Bill of Lading, § 3, providing that property when received from, or delivered on, private or other sidings, etc., shall be at owner's risk until cars are attached to trains, the words "or other" following word "private," including not all other sidings, but sidings like private sidings. *Bers v. Erie R. Co.* (N. Y. 1919), 122 N. E. 456.

Under Rev. Civ. Code, arts. 1930, 1933, and 1934, damages resulting from the washing away of a mat because of sudden rise in the river was not such as reasonably entered into the contemplation of the parties at the time of making the contract, whereby defendant railway was to carry stone which was to be used by plaintiff for sinking the mat against the bank of the river; and, to render defendant liable for damages due to delay in transportation, it must have been notified of the special circumstances before or at the time of entering into the contract. *Miller Engineering Co. v. Louisiana Ry. & Nav. Co.* (La. 1919), 82 So. 413.

6. In an action for cotton destroyed by fire in a compress for

which bills of lading had been issued exempting from liability for fire, which bills of lading were issued before the cotton was actually placed in the car, the court said:

"No evidence was offered to show that the fire was due to the negligence of the defendant, and none was offered to the contrary; and the plaintiffs contend that the burden of proof was on the defendant to show absence of negligence.

"In *Price v. Ship Uriel*, 10 La. Ann. 413, this court said:

"If the evidence had \* \* \* established the injury to have been occasioned by one of the perils excepted in the bill of lading, it would then have devolved upon the shippers to show that the defendants were guilty of negligence."

"In *Thomas v. The Morning Glory*, 13 La. Ann. 270, 71 Am. Dec. 509, this court said:

"The clause in the bill of lading limiting the responsibility of the carrier is not to be understood as having exempted him from liability for leakage occasioned by the \* \* \* negligence of himself or his agent, but as throwing upon the bailor the burden of proof of such \* \* \* negligence."

"To the same effect, *N. O. Mut. Ins. Co. v. N. O. J. & G. N. R. R. Co.*, 20 La. Ann. 302; *Kelham v. The Kensington*, 24 La. Ann. 100.

"This is the rule of the United States Supreme Court. *Cau v. Texas & Pacific R. R. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1057.

"The weight of authority is that, where the bill of lading exempts for

loss by fire, the shipper has the burden of proof to establish that the fire was caused by the negligence of the carrier.' Note, L. R. A., 1915D, p. 656.

"The Louisiana cases are very accurately reviewed in this note at page 669.'

"Of the case of *Lehman v. Morgan's R. R.*, 115 La. 2, 38 South. 873, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818, relied upon by plaintiffs, suffice it to say that the fire exemption clause had been stricken out of the bill of lading involved in it; and that consequently it bears no analogy to the present case.

"*National Rice & Milling Co. v. N. O. & N. E. R. Co.*, 132 La. 615, 61 South. 708, Ann. Cas. 1914D, 1099, is also not in point, as the case turned, not upon the question of burden of proof, but upon the question of whether on the facts as established by the evidence there was negligence. The court said:

"'From all this evidence we are led to the inference, which we think is positive, that there was negligence.'

"After the court had gone fully into the facts on the question of negligence, the question of burden of proof became merely academic.

"The risk of fire having been accepted, and the loss having been by fire, and no negligence on the part of the defendant company having been shown, the defendant company is not liable." *E. Borneman & Co. v. New Orleans, M. & C. R. Co.* (La. 1919), 81 So. 882, 883.

Where, after all except 1 of 100 bales of cotton to be shipped had been delivered on cars of the railroad company for shipment, part of the cotton so delivered was destroyed by fire, that the railroad company kept an inspector to inspect cotton shipments, and would not issue a bill of lading until the entire shipment had been inspected, will not exempt the company from liability for the loss by fire, as the issuance of a bill of lading is not the sole criterion for the carrier's liability. *Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co.*, (Tex. 1919), 212 S. W. 814.

## CHAPTER III.

### NEGLIGENCE DURING TRANSPORTATION.

**Acts Showing Negligence. Defective Appliances.** A common carrier of merchandise is not relieved of liability for loss of the goods merely because the shipper furnished the car in which the goods were loaded, where the car was leased from a third person, and for the use of such car upon the road the carrier pays to the owner a certain amount per mile, and the loss of the goods in transportation is due to a defect in the particular car.<sup>1</sup> How-

1. *Louisville & N. R. Co. v. Carr* (Fla. 1919), 81 So. 779. In this case the court said:

"The question presented by the first replication and demurrer thereto is whether a common carrier of goods or merchandise is in any measure relieved of its liability for loss of because of the fact that the shipper furnished the car in which the goods were loaded, which car he held by lease from a third person, and for the use of such car upon the road the carrier paid to the owner a certain amount per mile, when the loss of the goods in transportation is due to a defect in the particular car.

"This was an interstate shipment, and the liability of the carrier is to be determined according to the rules prescribed by Congress as to the duties of common carriers with respect to the transportation of goods from one state into another. The measure of this liability was fixed by the amendment of June 29, 1906, to the original Interstate Commerce Act of February 4, 1887, and commonly referred to as the Carmack Amendment. The liability imposed upon the carrier was defined by Mr. Justice Lurton in the case of *Adams*

*Exp. Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, in the following language:

"What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage, or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage' would be to ignore the qualifying words 'caused by it.' The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common-law duty as a common carrier."

"See, also, *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319,

36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265.

"Now, it is the common-law duty of a common carrier to furnish suitable and safe cars for the carriage of any particular kind of commodity undertaken to be conveyed. See 4 R. C. L. p. 682.

"In every case where a carrier has been accustomed or has contracted to carry or has held itself out as carrying any particular class of goods it must provide cars which are suitable for the carriage of such goods. This imports that a common carrier must provide a vehicle in all respects adapted to the purposes of carriage, which implies not only that it must be a type so constructed as to be able to encounter the ordinary risk of transportation, but also that it must be perfect in all its parts.' 4 R. C. L. p. 682.

"See, also, 4 Elliott on Railroads, 1475; *Bea— v. Illinois Cent. Ry. Co.*, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; *Forrester & Co. v. Southern R. Co.*, 147 N. C. 553, 61 S. E. 524, 18 L. R. A. (N. S.) 508, 15 Ann. Cas. 143; *Empire Transportation Co. v. Wamsutta Oil Co.*, 63 Pa. 14, 3 Am. Rep. 515; *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. Rep. 871; *New York, P. & N. R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722. A failure on the part of the defendant carrier to provide a suitable and safe car for the transportation of the turpentine, having undertaken to carry it and holding itself out as a carrier of such commodity, would be a breach of its common-law duty, and any loss of the turpentine attributable to the unsuitableness, unfitness or defective condition of the car

would be within the meaning of the act of Congress a loss or damage caused by the carrier, or an act of negligence on its part.

"What effect upon the carrier's liability would have been produced by a contract between the shipper and the carrier, whereby the former agreed to and did furnish the car, or inspected it and accepted it as suitable for the purpose as furnished by the railroad, or the car, having been supplied by a third person, was used by the railroad and rented by the shipper as suitable and fit for the transportation of the turpentine? The carrier will not be permitted to contract against its own negligence. Its duty is to supply suitable cars, as much so as it is to supply a safe track and suitable engines and competent employees. If a common carrier would be permitted by contract to relieve itself of the duty of supplying a suitable car, there is no reason why it should not by contract protect itself from the omission of duty to supply a suitable engine, or safe roadbed and track, or competent employees. It is universally conceded that the carrier cannot by contract protect itself against the consequences of its own negligence. Therefore no arrangement, understanding, agreement, or scheme between the shipper and carrier will be given the effect of relieving the carrier from the consequences of its own negligence. What the carrier cannot directly accomplish by contract it cannot by indirection accomplish. See *Louisville & N. R. Co. v. Dies*, *supra*; *Forrester & Co. v. Southern R. Co.*, *supra*; *Pierce Co. v. Wells Fargo & Co.*, 236 U. S. 278, 35 Sup. Ct. 351, 59 L. Ed. 576; *Santa Fe, P. & P. R. Co. v. Grant Bros.*

ever, a carrier may not be liable for an injury that occurs on the private side track of a shipper.<sup>2</sup> It is the duty of a carrier to keep

Const. Co., 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787; *Adams Exp. Co. v. Croninger*, *supra*. See numerous authorities cited in 10 C. J. 154, 155; 4 R. C. L. 767; *Atlantic Coast Line R. Co. v. Coachman*, 59 Fla. 130, 52 South. 377, 20 Ann. Cas. 1047; *Summerlin v. Seaboard Air Line Ry.*, 56 Fla. 687, 47 South. 557, 19 L. R. A. (N. S.) 191, 131 Am. St. Rep. 164.

"The pleadings and the evidence in case differentiate it from those few cases referred to in the brief of counsel for defendant whereby under a distinct agreement by the shipper to assume the risk of the sufficiency of a car furnished by him for a particular shipment the carrier was held to be not liable for loss of goods due to defects in the car. See *Cleveland, C. & St. L. Ry. Co. v. Louisville Tin & Stove Co.*, 111 S. W. 358, 33 Ky. Law Rep. 924, 17 L. R. A. (N. S.) 1034, and cases cited in the note. In this case the car was selected by what appears to have been a general understanding between the railroad, the car company' and the shipper that it was suitable for the purpose of transporting kerosene oil, turpentine, and such material therein in bulk. We think that the common-law duty of the carrier to provide such a car free from defects, one in all respects adapted to the purpose, one able to encounter all the risks of transportation and perfect in all its parts, was not taken from it by the arrangement between the shipper, the car company, and the defendant set out in the pleas and replication and shifted to the shoulders of the shipper; that the liability of the defend-

ant for loss resulting from any defect in the car was not affected by the arrangement, and it became responsible for the loss of the turpentine under the state of facts set out in the pleadings and shown to exist by the evidence."

2. Claimant brought suit for loss of merchandise intended for transportation from Passaic, N. J., to New York City, shipped under Section V of Paragraph VII of the Uniform Bill of Lading which provided as follows: "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on 'private or other sidings,' wharves, or landings shall be at owner's risk until the cars are attached to and after they are 'detached from trains.'" The merchandise had been loaded by shippers upon a car which was placed on a track in front of their warehouse, this track being constructed by carrier on its own land, east of the freight house, for the receipt and delivery of freight at a number of private warehouses, and was under its exclusive control. It extended from the freight house about a mile parallel with the main track. It was connected with the main track with two sets of switches. There was also a connecting piece of side track on which cars were placed for loading and unloading at the freight house, but the track in question was used

suitable pens for shipment of cattle.<sup>3</sup> A railroad was liable for damages, where claimant, whose hogs when being driven to the railroad's pens for shipment, ate a poisonous substance used in dipping vats on the land of a third party near the pens, though the railroad had no control, and did not know that the poisonous substance was there.<sup>4</sup> A common carrier, undertaking to dip cattle, pursuant to the quarantine regulations of the state board of agriculture and the Bureau of Animal Industry of the Department of Agriculture of the United States, owes the duty to the owner of said cattle to exercise ordinary care in dipping the same. Whether or not such carrier, in so dipping said cattle, exercised ordinary care, is a question of fact for the jury; and where there is competent evidence, which will reasonably sustain the verdict of the jury, a court will not disturb such verdict.<sup>5</sup>

regularly by the warehouse in front of which it ran. It was a side track, a short track connected with the main track, a siding. The property was destroyed while on this siding and claimant contended that it was not a "private or other siding" within the meaning of the Bill of Lading. In holding that the claimant could not recover the court held:

It was not a private siding. Private sidings include mainly those which are owned or maintained by shippers for the purpose of connecting their factories and warehouses with the tracks. They thus provide themselves with conveniences which the railroad fails to furnish. It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, like the freight station and yards. It was not a part of the railroad terminal or freight station. It was separated therefrom as effectively as if the warehouses had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses

were adjacent thereto. It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantages of a private siding without the burden of private ownership. If any force is to be given to the words "or other," as qualifying rather than amplifying the word "private," they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished. *Bers v. Erie R. Co.* (N. Y. 1919), N. E. 122, 457.

3. *Lancaster v. Pitzer* (Tex. 1919), 211 S. W. 313.

4. *Lancaster v. Pitzer* (Tex. 1919), 211 S. W. 313.

5. *Missouri, K. & T. Ry. Co. v. Williamson* (Okla. 1919), 180 Pac. 961.

Claimant shipped cattle from Panama, Okla., to Wynona, Okla., where they were unloaded. Claimant at-

And at common law negligence is not necessary to render a carrier liable for injury to live stock during shipment, as the carrier is an insurer.<sup>6</sup>

**Delay.** Of course, if a carrier unreasonably delays a shipment it is responsible for the ensuing damages. In an action for delay in an interstate shipment, the burden of proving that the delay was occasioned by the carrier's negligence is governed by the federal laws, as interpreted by the Supreme Court of the United States, and is not subject to control by state laws; such question being a matter of substance.<sup>7</sup> Where a shipper deliv-

tempted to water them there but was prevented to do so by the carrier, who retained possession of them and held them for the purpose of dipping. Claimant stated they should be watered first, as otherwise they would attempt to drink some of the dip contained in the dipping vat, which contained arsenic. In spite of this, employes of the carrier drove the cattle into the dipping vat without watering them. Some of the cattle drank of the dip and died. *Held*, that the carrier owed the claimant the duty to exercise ordinary care in dipping his cattle; that it was the duty of the carrier to exercise such care as a reasonably prudent person would exercise in the circumstances of the case. From the evidence of the claimant the agents of the carrier were advised of the thirsty condition of the cattle and the probability that they would drink of the solution in which they were dipped unless they were watered before being dipped. They were requested by the claimant to afford him an opportunity to water said cattle before dipping commenced. Whether the contracts relied upon by the carrier imposed the duty of watering the cattle upon claimant or not, when cattle were in charge and in

possession of the carrier, the carrier owed plaintiff the duty to afford him reasonable opportunity to perform the duty imposed upon him. The evidence of the plaintiff shows that, although the attention of the defendant's agents and employes was called to the probable consequences of dipping these cattle without their being watered, they refused to delay the dipping long enough to permit plaintiff to haul water for his cattle. The question of what is ordinary care under the circumstances of each case is for the jury to determine. The verdict of the jury was upheld. *Missouri, K. & T. Ry. Co. v. Williamson* (Okla. 1919), 180 Pac. 961.

6. *Boyd v. St. Louis Express Co.* (Mo. 1919), 211 S. W. 702.

7. *Baker v. Schaff* (Mo. 1919), 211 S. W. 103.

Where the bill of lading required the carrier to transport the goods with reasonable dispatch, it was not error, in an action for delay, to admit testimony of the shipper that he was told by defendant's clerk, through whom the shipment was made, when it would reach its destination. *Southern Pacific Co. v. Stephany*, 255 Fed. 679.

ered an interstate shipment of goods to a carrier and directed it to be sent over a route having an established through charge, the initial carrier was charged with the duty to make necessary notations on the waybill, and the shipper had the right to assume compliance with that duty, and he was not responsible for any misrouting.<sup>8</sup> The fact that an elevator, which shells ear corn is located on a line of a railroad, and that the tariffs of the railroad permit corn to be shelled in transit, does not make the elevator

8. *Lancaster v. Schreiner* (Mo. 1919), 212 S. W. 19.

The tariff of the Rock Island Railway contained the following provision:

"(A) Wheat, corn, rye, oats, or barley, originating at stations on the Chicago, Rock Island & Pacific Railway, or connecting lines, as specifically provided in item No. 22, may be cleaned; milled, malted or manufactured; grain or grain products may be mixed; corn may be shelled; seeds may be cleaned or mixed in transit at any station on the Chicago, Rock Island & Pacific Railway on and east of the Missouri river, and the product forwarded to ultimate destination on the following basis:

"(B) Current tariff rates applicable on the commodity as forwarded from transit station, figured from original point of shipment of grain or its products or seeds to ultimate destination, plus following additional charge for out of line or back haul if any."

Claimant contended that this tariff provision compelled the carrier, when such instructions were noted on the bill of lading, to shell corn in transit. The court said:

"This merely permits the shipper to have his corn shelled en route, but does not obligate the carrier to do the shelling. If the carrier had this

done, it was merely acting as the shipper's agent in so doing. Nothing in the clause quoted nor in the nature of the defendant's business indicated that it undertook to shell the corn. Nor do the rates charged warrant such an inference. The notation that the corn was to be shelled at Davenport was no more than a direction how the shipment was to be handled, and did not constitute a contract that defendant would shell it. Moreover, the amount paid the Davenport Elevator Company for shelling the corn was added to the freight charges as found in the schedule, and both paid by the commission merchant acting for plaintiff and with the commission deducted from the proceeds of the corn. This advised plaintiff that shelling of the corn was treated as distinct from the carriage, and, as will later appear, plaintiff had no reason for supposing, if he so did, that defendant was engaged in the business of shelling corn. For these reasons, we concur in the trial court's ruling that the contract did not purport to require defendant to shell the corn. This disposes of the point raised by defendant that the railroad company, engaged in interstate commerce, may not contract to shell corn en route or otherwise." *Fay v. Chicago, R. I. & P. Ry. Co* (Ia. 1919), 173 N. W. 69, 71.

the agent of the carrier to such an extent that the carrier can be held liable for delay in transit caused by delay of the elevator company in not promptly shelling such corn as is given it.<sup>9</sup> Claimant shipped goods from San Francisco to New York in August 1916, which he expected to sell for certain trade that was in New York in September. He inquired from the railroad clerk how long it would take a shipment to get to New York and was told fifteen days. Held, that such conversation was admissible to show what was a reasonable time for transportation, even though the bill of lading contained a provision that the carrier was not bound to transport property by any particular train or in time for any particular market.<sup>10</sup>

**Refrigeration.** It is the duty of a carrier to furnish refrigerator cars and if it fails to do so it is liable.<sup>11</sup> A carrier accept-

9. *Fay v. Chicago, R. I. & P. Ry. Co.* (Iowa 1919), 173 N. W. 69.

10. *Southern Pac. Co. v. Stephany*, 255 Fed. 679.

Where there is evidence of unusual delay in transmission of stock, railroad's failure to explain delay is of itself clothed with probative force on the question of whether delay was unreasonable. *Baker v. Brown*, 210 S. W. 312.

In a shipper's action for delay in transmission of live stock shipment, instruction on issue whether carrier held shipment "for a great length of time" was not prejudicial, though some other expression than that quoted could have been more appropriately used, where there was undisputed evidence of delay. *Baker v. Brown* (Tex 1919), 210 S. W. 312.

Claimant shipped hogs from South Dakota to Iowa, which should have made the trip in eighteen hours. Hogs did not arrive until four hours late. It seems there was a slight delay in transit, owing to dividing the train into two sections, and when the hogs arrived the car in which

they were was very dry and dusty, and there was no evidence or circumstances indicating that the car had been swept or sprinkled in transit. As the car was very dry, although the conductor of the train testified that the car had been sprinkled three times during transit, the sprinkling being done by means of a pipe or spout through which water was sprinkled on the car from the ground as the train moved by the point where the pipe was located. *Held*, that the verdict of the jury holding the carrier liable for negligence is affirmed. *Lerum v. Chicago, M. & St. P. Ry. Co.* (S. Dak. 1919), 172 N. W. 878.

Where a delay and slowness of transportation after a stallion was accepted for shipment caused and enabled a slight cold it contracted to develop into pneumonia which caused its death, the carrier is liable. *Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

11. It is not necessary for the plaintiff, in an action for damages

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ing a shipment of peaches for transportation under a contract to re-ice the car to full capacity at a certain point, assumed duty of providing a sufficient supply of ice, was bound to exercise the care and diligence that the character of the goods required, and was liable for damages for failure to re-ice the car, or for insufficient icing.<sup>12</sup>

to an interstate shipment resulting from defective refrigerator cars, to S Ry. Co. (Tex. 1919), 210 S. W. 276.

either allege or prove negligence of 12. Bobzein v. New York Cent. R. Co., 176 N. Y. S. 406.

the carrier. Nabors v. Colorado &

## CHAPTER IV.

### LIABILITY AFTER ARRIVAL AT DESTINATION.

**Circumstances Justifying Recovery. Negligent Acts in General.** When a railroad company receives goods for transportation, safely carries them to their destination, informs the consignee of their arrival, and affords him reasonable opportunity to remove, its obligations as a common carrier are at an end.<sup>1</sup> But the obligation of a common carrier as insurer does not terminate

1. *James v. Alabama Great Southern R. Co.* (Ala. 1919), 81 So. 582.

When a common carrier receives goods for shipment, it insures their delivery in accordance with bill of lading, unless the loss is occasioned by act of God, or of a public enemy, or by reason of inherent defect or vice of goods or animals, or on account of fault of consignee. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1919), 209 S. W. 775.

The general rule is that a non-negotiable contract of shipment by a common carrier is discharged by delivery to the consignee without surrender or production of the bill of lading; the fact that one is consignee being evidence of ownership. *Edelstone v. Schimmel* (Mass. 1919), 123 N. E. 333.

In action against carrier for injuries to mules in transit, carrier was entitled to charge that a common carrier is not an insurer of live stock received for transportation, but liable only for injuries caused by its own negligence. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.*, 210 S. W. 853.

Where succeeding carrier refused to accept goods, and consignee instructed tendering carrier to store

goods in warehouse, liability of tendering carrier to owner, whether consignee or consignor, for subsequent loss or injury to goods, terminated upon storing goods as instructed. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

Though, after arrival of shipments of rock to be used in sinking mat against bank of river, defendant refused, after prompt notice of the circumstances under which damage was really to occur, to deliver at the usual and proper place for plaintiff to unload until after loss had occurred, defendant's refusal was not the proximate cause of the damage due to mat being carried away by a sudden rise in the river, and defendant is not liable for such damage. *Miller Engineering Co. v. Louisiana Ry. & Nav. Co.* (La. 1919), 82 So. 413.

Where, after arrival of shipments of rock to be used in sinking mat against bank of river, defendant refused, after prompt notice of the circumstances under which the damage was really to occur, to deliver at the usual and proper place for plaintiff to unload until after loss had occurred, plaintiff could recover if said failure was the proximate cause

upon arrival until the consignee has had a reasonable time within which to remove the same, and generally speaking, under the uniform bill of lading this liability is extended for forty-eight hours after arrival.<sup>2</sup> The duty of a carrier does not terminate upon arrival of the goods at destination. It is its duty to take such care of the shipment as the character of it demands, and if such a shipment is perishable produce, and needs icing it is the carrier's duty to furnish it.<sup>3</sup> And a carrier, during the 48-hour period given a consignee in which to remove a consignment of

of the loss. *Miller Engineering Co. v. Louisiana Ry. & Nav. Co.* (La. 1919), 82 So. 413.

Where consignee of cotton shipped by rail did not intend to take it away, but to sell it to other dealers at destination, he cannot hold railroad to strict liability as carrier for cotton after due notice served on him that it had been unloaded at compress company's warehouse, when he fails to show any effort on his part to relieve the railroad of its responsibility; the railroad being liable for the cotton, under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 712, only as a warehouseman. —*State Shipment. Wichita Valley Ry. Co. v. Golden* (Tex. 1919), 211 S. W. 465.

2. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S. 407, 411.

3. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S. 407, 411.

The interstate transportation of goods did not end with the placing of the goods on pier for delivery to consignee, where consignee had not taken possession or paid freight charges, and the 48-hour period given him in which to remove consignment had not expired. *O'Brien v. Pennsylvania R. Co.*, 176 N. Y. S. 390.

Where initial carrier, on accepting shipment of fruit, assumed duty of

re-icing car to full capacity at certain point, it was final carrier's duty to re-ice car at point of delivery, where re-icing was necessary to prevent spoiling of fruit pending removal by consignee during the 48-hour period given it by bill of lading. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S., 406.

In absence of an agreement, carrier holds goods as a carrier for a reasonable period of time after notice to consignee; its duty not being reduced to that of a warehouseman until expiration of such period. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S., 406.

A carrier, which delivered a shipment of hogs at the proper place according to the car tickets before the time to unload under the Twenty-Eight Hour Law, which shipment the consignees refused to accept, because the car tickets made by a connecting carrier did not agree with the bills of lading, which called for delivery at another point, so that the time for unloading had expired before the shipment could be redelivered, and further delay was occasioned by the refusal of another connecting carrier to accept shipment after government inspector had ordered it unloaded for rest and feed, there was no willful disobedience of the act, or even neg-

fruit, could not abandon the fruit, and was bound to use reasonable diligence to protect it from injury.<sup>4</sup>

**Notice of Arrival to Consignee or Shipper.** Where a succeeding carrier refuses to receive goods, the tendering carrier must use reasonable diligence to notify consignor or consignee, whichever is entitled to such notice, and to take reasonable care of goods while awaiting instructions, and if carrier, at request of consignor or consignee, deposits goods in warehouse of a third party, its liability as a carrier or warehouseman is terminated, and it is not liable for subsequent loss, destruction, or injury to the goods.<sup>5</sup>

**Consignee's Right to Inspect.** An inspection of a shipment of goods upon arrival by the consignee is not a delivery.<sup>6</sup> Permission given consignee's agent to inspect shipment of fruit does not constitute delivery of the car to consignee.<sup>7</sup>

ligence, and the carrier is not liable for the penalty. *United States v. Allentown Terminal R. Co.*, 256 Fed. 855.

Where a railroad had received cotton for transportation, and its failure to issue bills of lading for and to move it promptly was due to the action of its agent, the conductor of train, for his own convenience, and not for the benefit of the shippers, nor because of lack of information as to destination or consignees, the road's liability was that of carrier, rather than a mere warehouseman, under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 709, 710. *Sugarland Ry. Co. v. Dew Bros.* (Tex. 1919), 212 S. W. 190.

In absence of agreement, consignee has a reasonable time after notice of the arrival of goods in which to remove them. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S. 406.

4. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S. 406.

5. *Ocean S. S. Co. of Savannah*

*v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

Assuming that consignor of interstate shipment was entitled to notice of storage of goods in a warehouse, consignee having refused to accept the goods, notice from initial carrier to consignor was sufficient, in view of the Carmack Amendment. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

Written notice to the consignee of goods from the carrier of their arrival is not necessary, where the consignee has actual notice of the fact.—*State Shipment. Wichita Valley Ry. Co. v. Golden* (Tex. 1919), 211 S. W. 465.

6. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S. 407, 412.

7. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S. 406.

Unless the consignor while goods are in transit changes instructions, the consignee may change time and place of delivery. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

**Conversion.** Assuming that it is duty of carrier to notify a consignor of the refusal of a consignee to accept goods, mere failure to do so does not of itself constitute a conversion.<sup>8</sup> Where goods were shipped from Alabama to Massachusetts, and there was a conversion of the goods in Massachusetts, in that carrier improperly stored goods in warehouse, where they were lost or injured, laws of Massachusetts must control in action in trover.<sup>9</sup>

**Misdelivery.** Where a shipper marked his goods as destined for "Jones," when he intended them for "Johns," the carrier would not be liable for failure to deliver at the latter station.<sup>10</sup>

8. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

9. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

The claimant, J. L. Owens Company, forwarded to the J. L. Owens Manufacturing Company, which was a selling company of its products, at Springfield, Illinois, over the defendant road and a connecting line, a carload of machinery by a straight bill of lading. After the car had reached Springfield, the defendant, at the request of the plaintiff, substituted an order bill of lading, in which the plaintiff was the consignor and consignee, and which provided for the surrender of the bill of lading duly indorsed before delivery of the shipment. The plaintiff, suing in conversion, claimed that the defendant made delivery to the J. L. Owens Manufacturing Company. The defendant claimed that it delivered to the plaintiff company; and that in any event the machinery was held in storage, ready for delivery on surrender of the bill of lading, when the suit in conversion was brought.

The jury found specially that the merchandise was held ready for de-

livery on surrender of the bill of lading at the time of the commencement of the action; and it returned a general verdict for the defendant. Conceding that the J. L. Owens Manufacturing Company received the machinery, the evidence is clear that there was no actual conversion or loss of the machinery; that no demand was ever made for it nor was there a surrender of the order bill of lading; that the plaintiff could have had it at any time if it had wanted it; and that it was held ready for delivery when this suit for conversion was brought. Under these circumstances a verdict other than for the defendant could not be sustained. *J. L. Owens Co. v. Chicago, R. I. & P. Ry. Co.* (Minn. 1919), 171 N. W. 768.

In an action for conversion, where plaintiff consignee alleged that the defendant express company converted the books as carrier, the evidence showing that the express company was holding them merely as warehouseman, there was a total failure of proof. *Buften v. Southern Express Co.* (Mo. 1919), 212 S. W. 74.

10. *James v. Alabama Great Southern R. Co.* (Ala. 1919), 81 So. 582.

**Refrigeration.** Claimant shipped a car of peaches from New York to Michigan under instructions to re-ice. Upon arrival the consignee ordered the car to be re-iced, which the delivering carrier failed to do, and there was some doubt as to whether the car was re-iced in transit, although the car was in good condition at the time it arrived, but not being sold for several days after arrival the shipment deteriorated because of the failure to obey the consignee's orders to re-ice. Suit was brought against the initial carrier for the negligence of the terminal carrier in not re-

"The rule is that when a railroad company receives goods for transportation, safely carries them to their destination, informs the consignee of their arrival, and affords him reasonable opportunity to remove them, its duty and obligation as a common carrier are at an end. *Collins v. A. G. S. R. R. Co.*, 104 Ala. 390, 16 South. 140. If appellant was not at fault in the matter of directing the goods, and if the goods were billed to Johns, as appellant contended, then the duty of the defendant Alabama Great Southern Railroad Company, under its bill of lading, was to deliver the goods to the Louisville & Nashville Company for further transportation to Johns on the latter's line. But the initial carrier delivered the goods to the Southern Railroad for transportation to Jones. If therefore the contention of appellant were accepted by the jury, he was entitled to recover on the first or second counts of the complaint.

"When the mistake in carrying the goods to Jones was discovered, the Southern Railroad Company, on a new bill of lading, sent them to Birmingham for delivery to the Louisville & Nashville Company to be carried thence to Johns; freight money from Jones to Johns to be collected at the latter point. If the

facts were found in accordance with the contention of appellant, the defendant Louisville & Nashville Railroad Company was answerable to appellant in trover (6 Cyc. 474) or in detinue; this for the reason that, on this hypothesis of facts, no one had a right to haul plaintiff's goods about the country at his expense. However, we do not see that in any event there could be a joint recovery against the two defendants." *James v. Alabama Great Southern R. Co.* (Ala. 1919), 81 So. 582, 583.

Where initial carrier under through bill of lading to Johns, a station on the L. road, all charges paid, delivers goods to the S. road for delivery at Jones, and S. road under new bill of lading delivers to L. road for shipment to Johns, goods could be recovered from L. road in trover or detinue. *James v. Alabama Great Southern R. Co.* (Ala. 1919), 81 So. 582.

It appears that the plaintiff on the 28th day of May, 1912, consigned at Mobile a shipment of shoes to J. E. French & Co., at Rockland, Mass. At Mobile the shipment was delivered to the Louisville & Nashville Railroad Company. At Montgomery these shoes were delivered to the Central of Georgia Railway Company, which in turn delivered them to the de-

fendant at Savannah, Georgia, on June 5, 1912. When delivered to the Louisville & Nashville Railroad Company at Mobile, the goods were in good shipping condition, but when they were delivered to the defendant at Savannah they were not in good shipping condition. In the condition in which they were received these shoes were transported from Savannah to Boston by the defendant and at Boston were tendered to the New York, New Haven & Hartford Railroad Company, to be delivered to the consignee at Rockland, about 20 miles away. The N. Y., N. H. & H. R. R. Co. declined to receive this shipment because the cartons were neither sealed nor corded. These goods were returned to the wharf of the defendant at Boston.

On June 20, 1912, the defendant addressed a letter to the consignees, informing the consignees that it had these goods in its possession at Boston, that the N. Y., N. H. & H. R. R. Co. would not accept them for transportation, and requesting that the consignees have some express company call and receive these goods.

On October 2, 1912, an agent of the consignees called at defendant's place, and there left the notice of June 30, 1912, upon which was written the following: "As consignee of these goods, we decline to accept the same. So far as we are concerned, you may place in public storage for account, and at risk of the owner."

On October 5, 1912, the defendant notified in writing the Central of Georgia Railway Company, from whom it had received these shoes, that the N. Y., N. H. & H. R. R. Co. had declined to receive them, that the consignee also had declined to receive them, and that they would be

placed in public storage in Boston.

On October 7, 1912, the defendant had these shoes taken to and stored at the warehouse of the Quincy Market Cold Storage & Warehouse Company in Boston "for account and risk of the owners." The Quincy Market Cold Storage & Warehouse Company, after notifying J. E. French & Co. that these goods would be sold for the amount of charges then due at public auction on May 24, 1913, proceeded to, and did, sell them on that day.

Early in January, 1913, the plaintiff first learned that these shoes had not reached their destination. On February 24, 1913, the plaintiff learned that the goods had been refused by the N. Y., N. H., & H. R. R. Co., and on March 5, 1913, through an agent of the Louisville & Nashville Railroad Company at Mobile, the plaintiff was informed that these goods had been refused by the consignee and were at that time in "public storage at risk and expense of owner."

The Court of Appeals said:

"Bills of lading are prima facie the contracts of both carriage and delivery; and the carrier must ordinarily deliver only in accordance with the bill of lading. The bill of lading is usually a contract between the carrier and the consignor. The bill usually designates the person and place to and at which delivery must be made. The consignee, the person to whom delivery is directed to be made, is presumptively the owner of the goods, and must be treated by the carrier as the absolute owner until he has proper and valid notice to the contrary; and a delivery to him without such notice will discharge the carrier. If the consignor desires to retain title or ownership in the goods,

he must notify the carrier of such fact. In the absence of other directions, the goods are deliverable only to the consignee named in the bill of lading, or to his assignee. *Hutchinson on Carriers*, vol. 1, §§ 177, 179; *Lawrence v. Minturn*, 17 How. 106, 107, 15 L. Ed. 58; *Halliday v. Hamilton*, 11 Wall. 564, 20 L. Ed. 214. Prima facie the legal title to goods shipped is in the party to whom the bill of lading is made or indorsed. *The Thames*, 14 Wall. 108, 20 L. Ed. 804. An indorsement of the shipping receipt transfers title to the goods. *N. P. R. R. Co. v. Bank*, 123 U. S. 738, 8 Sup. Ct. 266, 31 L. Ed. 287. Where the consignee of goods or indorsee of bills of lading cannot be found by the carrier, it is the duty of the latter to retain the goods until claimed or store them in a warehouse for and on account of the owner, who is prima facie the consignee or indorsee. 14 Wall. 107, 20 L. Ed. 804; 123 U. S. 734, 8 Sup. Ct. 266, 31 L. Ed. 287.

"As the consignee is the person to whom delivery is to be made, unless the consignor, while the goods are in transit, changes the instructions, the consignee or the owner has the right to change the time and place of delivery. Mr. Hutchinson thus declares the rule:

"It has been shown in the last chapter that the owner of the goods may at any time change his instructions to the carrier as to their destination, and may, if he chooses, countermand his previous orders in regard to them; and this he may do at any time during the transit. But the consignee is the presumptive owner, and unless the carrier is advised that the consignor has not parted with his title, and that it is to vest in the

consignee only upon the performance of certain conditions, as, for instance, the payment of their price, a delivery at any place appointed by the consignee will discharge the carrier from his liability, even though it should not be the place appointed by the consignor.' *Hutchinson on Carriers*, vol. 2, § 735.

"Where the succeeding carrier, as in this case, refuses to receive the goods, the tendering carrier must use reasonable diligence to notify the consignor or consignee, whichever is entitled to such notice, and to take reasonable care of the goods while awaiting instructions from the consignor or consignee; and if he, at the request of the consignor or consignee, whichever is entitled to notice, deposits the goods in a warehouse of a third party, his liability as a carrier or warehouseman is terminated, and he is not liable for subsequent loss, destruction, or injury to the goods. *Hutchinson on Carriers*, vol. 1, §§ 131, 132.

"It should be noticed in this case, which we feel the Court of Appeals failed to take account of, that it was not the duty of this defendant, an intermediate carrier, to deliver the shipment to the consignee, but to the next connecting carrier. This it could not do, because the succeeding carrier refused to accept. On this refusal the defendant was under the duty to notify either the consignor or consignee, and to abide by that instruction, if reasonable. This it did. The sole fault found of the defendant's conduct by the Court of Appeals was the failure to notify the consignor after the refusal of the consignee to accept. If the consignee had accepted the goods, then, of

course, there would have been no liability to the consignor.

"If the goods had belonged to the consignor, and not the consignee, at the time of notice to the consignee, a question we do not attempt to decide, nevertheless the bill of lading, the evidence of the contract of shipment, made the consignee the agent of the defendant to receive the shipment, and release the carrier, and, nothing else appearing, the bill of lading passed the title to the consignee, so far as the contract of shipment was concerned. If it had been the duty of the defendant carrier to have delivered the goods to the consignee, and not to the connecting carrier, and the consignee had declined to receive or accept them, there might be a duty to notify the consignor of the refusal; but the mere failure would not of itself constitute a conversion. *Bolling v. Kirby*, 90 Ala. 215, 222, 7 South. 914, 24 Am. St. Rep. 789.

Here, however, was a notice to the consignee of the refusal of the succeeding carrier to accept, with inquiry for instructions, and the answer from the consignee, and his instructions followed, which ended this defendant's liability. If any unlawful conversion occurred, it was long after this and by the warehouse company, which was not the agent of defendant, but of the consignee or consignor, or whoever was the owner.

If it could be said, however, that the consignor was entitled to notice of nondelivery, the Court of Appeals shows that he was notified thereof some two months before the conversion by the warehouse company. Not by this defendant, it is true, but by the initial carrier, the company with whom the contract of shipment was

made, and who was liable to the consignor, if any one was, for failure to deliver, and who was under a duty to notify plaintiff if anybody was. The Court of Appeals was in error in holding that this notice was not sufficient, because not given by the proper party, or because the name of the warehouse was not given.

This was an interstate shipment, and governed by the federal statutes and the law of carriers as construed by the federal courts. The conversion, if any occurred, was in the state of Massachusetts, and not in Alabama, although the contract of shipment was made in Alabama.

The Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]) affects the liability of the receiving or initial carrier, but does not make the intermediate carrier liable for the acts of other connecting carriers. It makes the initial or receiving carrier the principal, and the other connecting carriers its agents, and makes it liable for the wrongs of any succeeding carriers; but it does not make each of the connecting carriers liable as for the wrongs of any other connecting carrier. *A. C. L. v. Riverside Co.*, 219 U. S. 186-196, 31 Sup. Ct. 164, 167, 55 L. Ed. 167; *Root v. G. N. R. R. Co.*, 45 N. Y. 524.

In the first case above cited the constitutionality of the Carmack Amendment was upheld and construed, and, among other things, it is said:

"The receiving carrier makes the rate and the route, and as the agent of every such connecting carrier executes a contract which is to bind each of them severally, but not jointly; one of the terms of the agreement being that each carrier shall be liable only for loss or damage occurring on

its own line. Through this well known and necessary practice of connecting carriers there has come about, without unity of ownership or physical operation, a singleness of charge and a continuity of transportation greatly to the advantage of the carrier and beneficial to the great and growing commerce of the country. \* \* \*

"In substance Congress has said to such carriers: 'If you receive articles for transportation from a point in one state to a place in another beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents, and not as agents of the shipper.' It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

We do not think any of the cases cited in the opinion of the Court of Appeals support the holding. The case of *L. & N. R. R. Co. v. Brewer*, 183 Ala. 172, 62 South. 698, holds that the carrier is not liable to the shipper as for failure to deliver, where the goods were carried to the end of its line and delivered to a connecting carrier, who stored the goods in a warehouse, and mailed notice to the consignee. In that case the action was against the initial carrier, which, under the Carmack Amendment, was liable as for any wrong of any connecting carrier; and yet it holds that, if the facts alleged in the plea were true, there was no liability. The facts

set up in that plea made no stronger case for the defendant than did the undisputed facts in this case, as found by the Court of Appeals. It is true a state statute was invoked in that case, which cannot apply here, because the place of delivery is in Massachusetts; yet the notice to the consignee is proven without dispute, and that he either consented to or directed the storage in the warehouse. While it does not appear that the consignor also had notice before the storage in the warehouse, he did have notice thereof more than two months before the conversion, and, if he had desired so to do, could have had the goods by paying the proper and lawful charges. Moreover, it is difficult to understand why this plaintiff should have waited nearly a year before making any inquiry as to the goods or shipment, if it really owned the goods, or was even acting as agent for the consignee in shipping. The plaintiff either owned the goods, and the consignee was its agent to receive and receipt for them, or the consignee owned them, and the consignor was its agent to ship them. Both parties seem to have denied ownership of them, when they were shipped, and when they would have been delivered, but for the dispute between the consignor and consignee as to whose goods they were. The dispute was not that each claimed to own the goods, but that each claimed that the other owned them. It was not until there appeared to be an opportunity to fix liability on the carrier that the consignor and consignee agreed among themselves as to who owned the goods.

As was said by this court in an early case, the duties are not all on one side as to shipments of freight. The consignor and consignee owe

duties to the carrier, as well as those owing to them by the carrier. In this early case it was said, after stating the duty of the carrier to store in his own warehouse, if he had one:

"It seems that the duty of the company is performed, and their responsibility at an end, if, 'after carrying the goods to the place of destination, and keeping them safely for such a length of time as to afford the owner an opportunity, by the use of due diligence, to remove them, they deposit them in the warehouse of a responsible person, for and an account of the owner or consignee. In such a case the warehouseman with whom the goods are stored becomes the agent or bailee of the owner. It must be remembered that in contracts for the carriage of goods the obligation is not all on one side. It is as much a part of the contract that the owner or consignee shall be ready at the place of destination to receive the goods when they arrive, or within a reasonable time thereafter, as that the carrier shall transport and deliver them. If, however, the consignee is dead, or absent, or fails to receive the goods, the carrier is not justified in abandoning them, unless, perhaps (for even this is by no means clear), where the consignee, after actual notice of the arrival of the goods, refuses to receive them. See *Fisk v. Newton*, 1 Denio [N. Y.] 45 [43 Am. Dec. 649]; *Smith v. Nashua R. R.*, 27 N. H. 86 [59 Am. Dec. 364]; *Hemphill v. Cheine*, 6 Watts & S. [Pa.] 62; *Pierce, R. R.* 448, 449; 1 *Parsons*, Con. 660. On the contrary, it is his duty to secure them for the owner. He may, if he so elect, keep them as bailee on deposit; or, if he has come under no obligation, either by the terms of his agreement, or the course of business,

to hold the goods as bailee, he has the right to leave them in store with some responsible third person, and thus discharge himself from all further liability." *Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209.

The action being in trover, and the conversion the tort, if any having been committed in Massachusetts, the laws of that state must control, unless the contract should otherwise provide. No statute of that state is cited or relied upon by the Court of Appeals which would change the common-law rules on the subject, as declared by this court and the Supreme Court of the United States, which we have cited above; and, as before stated, so far as the contract of shipment is concerned, it is governed and controlled by the federal laws and decisions.

The decisions of the Supreme Court of Massachusetts, however, seem to be in accord with our own to the extent of preventing the affirmative charge from being given against this defendant, under the facts as stated by the Court of Appeals.

In the case of *Barker v. Brown*, 138 Mass. 340, the contention was made, as here, that the consignor should be notified before the carrier could discharge its liability as carrier, and that court held, as did ours in *Kidd's Case*, 35 Ala. 209, that such notice was not required. The Massachusetts court said:

"When a reasonable time had elapsed, it was the right of the railroad company to store the goods with some suitable and responsible warehouseman, and thus discharge itself from further liability. It was not compelled to determine the dispute which had arisen between the plaintiff and the owner, and such storing of the goods would be equivalent to a delivery

icing the car. In upholding the verdict of a jury holding the initial carrier liable the court said:<sup>11</sup> "There is authority for the proposition that the initial carrier cannot be held liable for a breach of duty or of contract arising as a result of negotiations between the final carrier and the consignee after the arrival of the shipment at its destination. It has been held that the initial

thereof to whichever of the two parties was entitled thereto. \* \* \*

"It is the contention of the plaintiff that, the Shephard & Morse Lumber Company not having been notified to remove the goods, the carrier could not deposit them so as to subject them to the warehouseman's lien, and that a lien could not be created except with the assent of the owner. We are not aware that it has ever been held to be the duty of the carrier to notify the owner or consignor of goods of a refusal to accept them before he can terminate his own liability as carrier, and thereafter hold them himself, or transfer them to another, to hold as a warehouseman. It is for the owner or consignor of goods to have some one at the place of delivery, when their transit is completed, to accept them. If he does not, the rule which imposes a duty upon the carrier to hold them himself as warehouseman, or to store them in some convenient place, sufficiently protects the goods he has shipped. It would be unreasonable that the carrier should not be allowed to terminate his contract of carriage until after notice to the consignor and subsequent assent by him to the storage of the goods. The assent of the owner or consignor of goods that a lien thereon for storage shall, under certain circumstances, be created, is one to be inferred from the contract of shipment he has made. If his consignee cannot be found, or

being found, refuses to accept, he must be held to authorize the storage of the goods. If the carrier is authorized to store them, it does not require argument to show that he may subject them to a lien for the necessary storage charges, and that the owner cannot thereafter sell or transfer them so as to divest the lien."

The law seems to be the same in New York as in Alabama and Massachusetts on this subject, as to duty to notify shipper or consignor, when consignee refuses to accept. See the case of *Manhattan Rubber Co. v. Chicago, B. & A. R. R. Co.*, 9 App. Div. 172, 41 N. Y. Supp. 83." *Ocean S. S. Co. of Savannah v. People's Shoe Co.*, (Ala. 1919), 81 So. 241.

Consignees of cotton by rail were bound by the custom and usage of the railroad in making delivery of cotton at a compress company's warehouse. (*State Shipment*) *Wichita Valley Ry. Co. v. Golden*, 211 S. W. 465.

Where carrier, as defense to non-delivery, pleaded that shipment was marked "Jones" instead of "Johns," as alleged by shipper, plea need not negative fact that freight money to the latter station was paid, a mere evidential fact not pleaded in the complaint. *James v. Alabama Great Southern R. Co.* (Ala. 1919), 81 So. 582.

11. *Bobzein v. New York Cent. R. Co.*, 176 N. Y. S. 407, 409.

carrier is not liable on such a new independent contract, either at common law or under the federal statutes. In *Wien v. New York Central & Hudson River R. R. Co.*, 166 App. Div. 766, 152 N. Y. Supp. 154, it was held that the initial carrier was only liable on the original shipment, and not for the failure of the final carrier to enter into a contract to reship the goods after the consignee had refused to receive them. In *Parker-Bell Lumber Co. v. Great Northern Railway Co.*, 69 Wash. 123, 124 Pac. 389, 41 L. R. A. (N. S.) 1064, it was held that the initial carrier was not liable for damages to goods caused after the point of destination had been changed and the goods re-routed under a new bill of lading over the lines of a new combination of carriers. It is not necessary for us to pass upon that proposition, as the agreement of the Michigan Central Railroad Company, the final carrier, to re-ice the car on September 9th, was not a new independent agreement within the meaning of the authorities above cited. It was merely an agreement to carry out an obligation under the contract of shipment. When the defendant accepted the peaches for shipment, it contracted to re-ice the car to capacity at Montrose. This the jury could have found that it did not do. If it had re-iced the car as directed, it might, with some reason, urge that, having received instructions in regard to re-icing, it would not be liable if such re-icing was not sufficient to protect the fruit from injury. Having failed to re-ice at Montrose as it was directed and paid to do, it cannot be heard to say that it was not liable to re-ice at all. When the defendant undertook the transportation of the peaches, it assumed the duty of providing a sufficient supply of ice. It was bound to exercise the care and diligence that the character of the goods required, and is liable for the damages caused by a failure to ice or by insufficient icing. 10 Corpus Juris, 92 § 101; *St. Louis, Iron Mountain & Southern Ry. Co. v. Renfroe et al.*, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317, 118 Am. St. Rep. 58; *Beard v. Illinois Central R. R. Co.*, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381. There is evidence in the record from which the jury might have found that, if the car had been re-iced at Montrose, the bunkers would have been one-half full on the morning of September 9th, and one-quarter full on the morning of September 11th. It is undisputed that failure to re-ice the car

on September 9th would result in the spoiling of the peaches by September 11th. It seems clear to us that the duty of protecting the fruit from injury by icing the car was a duty growing out of the contract of shipment, and that the agreement of the Michigan Central Railroad Company to re-ice the car at Detroit on September 9th was simply an agreement to carry out and fulfill the duty resting upon the carrier under the original contract of shipment. The shipment was one in interstate commerce, and the provisions of the Interstate Commerce Act are to be read into the contract of transportation. Under the provisions of the Carmack Amendment to the Hepburn Bill, amending the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act. Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]), the initial carrier is liable for any damage which results from negligence or carelessness in transportation, whether the damage happens upon its own lines or upon those of a connecting carrier, and, under section 1 of the act (U. S. Comp. St. § 8563), icing is included under the term 'transportation.' *Earnest v. D., L. & W. R. Co.*, 149 App. Div. 330, 134 N. Y. Supp. 323; *Wien v. N. Y. C. & H. R. R. Co.*, 166 App. Div. 766, 152 N. Y. Supp. 154; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. Section 1 of the act provides: 'The term "transportation" shall include \* \* \* all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' 24 Stat. 379, c. 104 § 1, as amended by 34 Stat. 584, c. 3591, § 1, and Act Cong. June 18, 1910, 36 Stat. 544, 545, C. 309, § 7 (U. S. Comp. St. § 8563). It is urged by the appellant, however, that as soon as the car was placed on the team track and the peaches had been inspected by the consignee's agent and found ripe, but not overripe, and in good condition, that the duty of the carrier as such was ended, even though the car had not been re-iced and the bunkers were empty at the time. We are unable to agree with such contention. It was apparent that if the peaches, which were ripe, were left in the car at that time of year, they would deteriorate very rapidly if not iced, and the evidence is undisputed that the peaches spoiled in two days. The representative of the Michigan Central Railroad Company was

told by the inspector that the car was 'empty and needed icing right away.' The consignee received notice of the arrival of the car on the morning of September 9th; it inspected the car by 11 a. m. that day and ordered it re-iced. The Michigan Central Company failed to re-ice it as agreed, and when the representative of the consignee went to the car on the morning of September 11th the peaches were spoiled. Under the terms of the bill of lading the consignee was entitled to 48 hours after notice of the arrival of the car within which to remove the peaches. During that time the common carrier could not abandon the fruit or negligently expose it to injury. It was bound to take care of it and use reasonable diligence to protect it from injury. Independent of any agreement, in this state, a consignee has a reasonable time after notice of the arrival of goods in which to remove them. *Faulkner v. Hart et al.*, 82 N. Y. 413, 37 Am. Rep. 574; *Wien v. N. Y. C. & H. R. R. Co.*, *supra*; 10 Corpus Juris, 235, and cases cited. During such reasonable time the carrier holds the goods as carrier. Its duty is not reduced to that of a warehouseman until after the expiration of such reasonable time. *Fenner v. Buffalo & State Line Railroad Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *McKinney v. Jewett*, 90 N. Y. 267, 10 Corpus Juris, 236, § 332. In this case the liability of the carrier as such was extended under the contract of shipment to 48 hours after notice of the arrival of the car. During that time it was liable as carrier, as it would have been liable as carrier for a reasonable time, after notice to the consignee of the arrival of the car, if the contract of shipment had not, by express terms, fixed a definite time. *Lyons v. N. Y. C. & H. R. R. Co.*, 119 N. Y. Supp. 703, affirmed 136 App. Div. 903, 120 N. Y. Supp. 1132; *Gary Bros. & Gaffke Co. v. Chicago, M. & S. P. Ry. Co.*, 49 Mont. 524, 143 Pac. 955; *Rustad v. Great Northern Railway*, 122 Minn. 453, 142 N. W. 727. It was not error for the trial court to hold as a matter of law that there had been no actual delivery of the car to the consignee prior to the agreement of the Michigan Central Railroad Company to re-ice it. The duty of re-icing the car being a duty of the common carrier, under the facts in this case, the contract of shipment had not been fulfilled at the time the consignee's representative inspected the fruit. There was still something for the carrier to do, and it retained possession of the car as carrier

pending the performance of that duty. 10 Corpus Juris, 232, § 325; Michie on Carriers, § 843. The inspection of the peaches by the representative of the consignee on September 9th was justified, and permitting such inspection did not constitute a delivery of the car to the consignee. *Earnest v. D., L. & W. R. R. Co.*, 149 App. Div. 330, 134 N. Y. Supp. 323. The questions of negligence arising through failure to re-ice the car at Montrose and at Detroit were properly submitted to the jury. We here found no error in the record requiring a reversal of the judgment."

**Warehousing.** Where a consignee of goods or indorsee of bills of lading cannot be found, it is the carrier's duty to retain the goods until claimed, or store them in a warehouse for and on account of the owner, who is *prima facie* consignee or indorsee.<sup>12</sup> Where books shipped by claimant to consignee were reconsigned by them to claimant, and after return to original point of shipment remained in the express company's possession for eight months, its possession was that of warehouseman, though several months had elapsed before it gave claimant notice of its possession.<sup>13</sup>

**Baggage.** A carrier holds baggage at destination that has not been called for as a warehouseman. In an action against a carrier as warehouseman for failure to deliver a trunk, known by claimant to have been destroyed by fire, the burden rested upon him to show affirmatively that such fire was the immediate result of negligence on the part of the carrier or its agents.<sup>14</sup>

12. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

13. *Buften v. Southern Express Co.* (Mo. 1919), 212 S. W. 74.

14. *Hestle v. Louisville & N. R. Co.* (Ala. 1919), 81 So. 149.

When the owner of goods in the hands of a warehouseman calls for delivery, and the warehouseman fails to deliver, the presumption of negligence arises. *C. of Ga. Railway Co.*

*v. Jones*, 150 Ala. 379, 43 South, 575, 9 L. R. A. (N. S.) 1240, 124 Am. St. Rep. 71; *Southern Ry. Co. v. Aldredge & Shelton*, 142 Ala. 368, 38 South 805. But where, as in this case, there is a full explanation of the failure to deliver on demand, and it is shown that the trunk and contents were lost by a cause not involving the bailee in liability, as by a fire, the attending circumstances being known to the plaintiff before demand made, and the demand being

merely formal, it cannot be presumed, from the mere failure to deliver, that the defendant had been wanting in care or had been negligent, and his negligence was the proximate cause of the loss.

Therefore, under the facts in this case, the burden rested upon the plaintiff to offer evidence to show affirmatively that the fire which destroyed the trunk was the immediate result of negligence on the part of defendant or its agents, and that the loss was the proximate result of this negligence, and charges asserting this proposition were properly given at the request of the defendant. *Seals v. Edmondson*, 71 Ala. 509; 40 Cyc. 473. *Hestle v. Louisville & N. R. Co.* (Ala. 1919), 81 So. 149, 150.

In an action against a railroad as warehouseman to recover for a trunk destroyed by fire, where defendant's evidence of the delivery of trunk to defendant's agent at destination and that plaintiff did not call for the trunk during the day of its arrival at destination was positive, plaintiff's

purely negative statement that she did not see trunk on platform at destination was insufficient to raise an issue of fact for the jury. *Hestle v. Louisville & N. R. Co.* (Ala. 1919), 81 So. 149.

In an action against a railroad company as warehouseman for damages for failure to deliver a trunk, an interrogatory propounded to defendant's train baggageman as to baggage handled and delivered on the day of its transportation *held* to call for a direct and positive statement of fact, independent of any record as to such baggage. *Hestle v. Louisville & N. R. Co.* (Ala. 1919), 81 So. 149.

In an action against a carrier as warehouseman, where it was shown that the trunk in question was lost by fire, the attending circumstances being known to plaintiff before the demand, which was merely formal, it could not be presumed from the mere failure to deliver that the defendant was guilty of negligence proximately causing the loss. *Hestle v. Louisville & N. R. Co.* (Ala. 1919), 81 So. 149.

## CHAPTER V.

### LIABILITY FOR NEGLIGENCE.

**In General.** A carrier of cattle is an insurer against loss of every kind, except that occasioned by the act of God, of the public enemy, of public authority, of the shipper, or from the inherent nature of the cattle.<sup>1</sup> At common law, on proof merely of delivery to a common carrier of inanimate goods for transportation, and proof of their nondelivery, the law implies that they have been lost by the negligence of the common carrier, or by reason of some cause for which it is responsible, and the plaintiff, suing for such loss, is relieved of the burden of proof, a rule applying to the initial carrier of inanimate goods under the Interstate Commerce Act, as amended.<sup>2</sup> The same result would follow if the initial contract of carriage were not an express contract, but one implied in law, because of the duty imposed by the federal statute, where the initial carrier received the shipment for interstate transportation to a destination beyond the terminal of its line.<sup>3</sup>

**Initial Carrier.** An initial carrier of an interstate shipment of live stock under the Interstate Commerce Act, as amended, was liable for injury and damage to the shipment due to the negligence or fault in duty of itself or of some connecting carrier.<sup>4</sup> An initial carrier giving a through bill of lading acts not only on its own behalf but as agent for all the carriers through whose hands the shipment would pass, and obligates for itself and for them its safe delivery at destination.<sup>5</sup> An initial carrier

1. *Missouri Pa. R. Co. v. Martindale* (Ark. 1919), 213 S. W. 777.

2. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

3. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

4. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

5. *Reidsville Paper Box Co. v. Southern Ry.* (N. Car. 1919), 99 S. E. 23.

"When the initial carrier at Fall River gave the through bill of lading for the goods to be delivered at Reidsville, it was acting, not only on its own behalf, but as agent for all the carriers (which are usually named on the bill of lading) through whose hands the shipment would pass, and

could by contract limit its liability for shipment to a foreign country to its own line; the Carmack Amendment not being applicable to such shipment.<sup>6</sup> An initial carrier liable to a ship-

obligated for itself and for them its safe delivery at Reidsville, N. C. Mills v. Railroad, 119 N. C. 693, and citations in Anno. Ed., 25 S. E. 854, 56 Am. St. Rep. 682.

"When the defendant, the last carrier, presented the freight bill and receipted the same, it did so as agent, not only for itself, but for the entire chain of carriers from Fall River, among whom the freight charged was to be apportioned." Reidsville Paper Box Co. v. Southern Ry., (N. C. 1919), 99 S. E. 24.

6. Chicago, M. & St. P. Ry. v. Jewett (Wisc. 1919), 171 N. W. 757.

"This being a shipment to a foreign country, the Carmack Amendment did not apply, and it was competent for the parties to make a contract limiting the plaintiff's liability to its own line. Best v. C. N. Ry. Co., 159 Wis. 429, 150 N. W. 484." Chicago, M. & St. P. Ry. Co. v. Jewett, (Wisc. 1919), 171 N. W. 757, 758.

"In the early days of transportation by rail a passenger bought his ticket over each successive line, and there were no through tickets, but the pressure of business and the necessity of the economy of time of the passenger and economy on the part of the railroad companies, by selling one ticket instead of a new ticket at the initial point of each railroad necessitated a change. There being no uncertainty as to the company by which a passenger sustains injury, there has been no modification by which the initial carrier has been made responsible for personal injuries to a passenger. But

as to the shipment of freight, whose volume has been enormously increased, the course of dealings is that the initial carrier assumes for itself and all others on the through bill of lading liability for its safe delivery, and this has been recognized by the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa], which authorizes action for loss or damage to goods in transit, against the initial carrier, and the courts in all the more recent decisions have recognized that a through bill of lading is in effect a joint contract upon which any one of the lines embraced in the contract of carriage can be sued, and recovery had against such corporation.

"This has become a necessity in the present enormous development of through transportation by rail and steamer lines. It would be impracticable to require a shipper to sue the initial carrier, and upon the finding by a jury that the loss was not sustained on that line to use in succession each of the companies composing the through line over which the shipment passed. This would be a *reductio ad absurdum*.

"The various companies which compose *pro hac vice*, the 'through line' over which any shipment passes, make a joint contract for their own convenience, or it may be a quasi partnership for the occasion, by which the bill of lading is given at the point of origin for the receiving company on behalf of itself and as agent for all the others down to the place of destination, and on this joint contract any

per for disdelivery and a connecting carrier liable to a shipper in trover or detinue for the goods could not be sued jointly in an

company in such line of through traffic can be sued. *Gilikin v. Railroad*, 174 N. C. 138, 93 S. E. 469. Upon proof of loss or nondelivery, the means are within the knowledge of the carriers, and not accessible to the shipper, by which the default can be readily traced and placed upon the particular company liable therefor, and the loss adjusted in the settlement of the through traffic accounts of these corporations. *Gallop v. Railroad*, 173 N. C. 21, 91 S. E. 375.

"So in like manner, whether the receiving company or the company delivering the goods receipts for the freight, it is a discharge of the shipper binding on all the companies; and, if there is a shortage in such delivery, action can be brought against any company represented by the bill of lading or in the freight receipt. The company liable for the damage or shortage will be ascertained by the common traffic manager, and in the settlement of the through traffic passing over their lines the carrier responsible will be charged up with the loss. Any other arrangement would be impractical in the present enormous development of through traffic. The defendant relies upon the headnote in *Insurance Co. v. Railroad*, 104 U. S. 146, 26 L. Ed. 679, decided in 1881, that 'in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination the carrier is only bound to carry safely \* \* \* and \* \* \* deliver to the next carrier in the route,' but the decision in that case states that the facts found were that there was no through bill of lad-

ing, and the bill of lading specified that the receiving company should not be held liable for any damage or deficiency beyond its terminus. In *Myrick v. Railroad*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325, it is also expressly provided in the bill of lading that—

"The company will not be liable or responsible for any loss, damage, or injury to the property after the same shall have been sent from any warehouse or station of the company."

"Judge Field says:

"The receipt does not, on its face, import any bargain to carry the freight through."

"The defendant also relies upon *McGuire v. Railroad* (C. C.) 153 Fed. 434, which holds that the fact that the destination of a shipment is beyond the line of the receiving company 'does not create any joint responsibility between the connecting carriers, where the shipment over each is under a separate contract which limits its liability for loss or injuries to such as may occur on its own line.' These cases therefore do not apply, for it does not appear that there is any such restriction in the bill of lading in this case." *Reidsville Paper Box Co. v. Southern Ry.* (N. C. 1919), 99 S. E. 24.

Where goods are shipped on a through bill of lading over several connecting lines, a receipt for the freight, either by the initial or terminal carrier, is a discharge of the shipper binding on all the carriers. *Reidsville Paper Box Co. v. Southern Ry.* (N. C. 1919), 99 S. E. 23.

action on the case.<sup>7</sup> In some states where two carriers are sued jointly in action on the case for failure to deliver a shipment of goods, counts based on separate liability of one or the other carrier are demurrable.<sup>8</sup>

7. *James v. Alabama Great Southern R. Co.* (Ala. 1919), 81 So. 582.

8. *James v. Alabama Great Southern R. Co.* (Ala. 1919), 81 So. 582.

Despite the federal Uniform Bills of Lading Act, under the Carmack Amendment of the federal Interstate Commerce Act, imposing liability on initial carrier for loss of or injury to property on other lines, where railroad issued order notify bill of lading covering shipment, and terminal carrier, turned goods over by irregular reconsignment to another carrier on strength of statement of third person that he had bill of lading, without asking for or seeing it, the initial carrier was liable. *J. F. French & Co., v. Pere Marquette Ry. Co.*, (Mich. 1919), 181 N. W. 491.

One guilty of a tort may be held to respond at least for failure to prevent harm which might in reason be anticipated. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.*, (Ia. 1919), 172 N. W. 471, 473.

If no express contract had been made with a railroad covering a shipment of live stock, and the stock had been received by it for transportation, the facts would have constituted it the initial carrier within the Interstate Commerce Act, as amended, for the entire route to destination beyond its own lines, and the railroad could alone have been sued for damage to the shipment, despite any subsequent contract of carriage made between the consignee and an intermediate con-

necting carrier. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

"The judgment was against all the carriers jointly for the full amount of the damages awarded by the jury. The pleading and evidence does not authorize such judgment. The initial carrier was under the law liable for the entire damages sustained in the shipment, but each of the other connecting carriers was liable only for such damages as may have resulted in consequence of its own negligence. Plaintiffs could sue all of the carriers in one suit, but a recovery against any defendant other than the initial carrier would be dependent upon an ascertaining of the amount of the damage occurring on the line of such defendant. *A., T. & S. F. Ry. Co. v. Boyce*, 171 S. W. 1094; *Eastern Railway Co. of New Mexico v. Montgomery*, 139 S. W. 885; *Hudson v. Railway Co.* (D. C.), '236 Fed. 30." *Ft. Worth & D. C. Ry. Co. v. Hill* (Tex. 1919), 213 S. W. 952, 953.

Where racing mare, shipped over two railroads, was deprived of proper feed and water, mistreatment being partly attributable to first as well as second railroad which handled her, second railroad was nevertheless liable for whole damage; the two having been joint tortfeasors. *Bassett v. Chicago & N. W. Ry. Co.* (Wisc. 1919), 171 N. W. 749.

A bill of lading in which the blanks left for stations named on the railroad company's line were not filled,

**Exchange Bill of Lading.** Some cases have arisen whereby the original bill of lading is surrendered during transit, and a new bill of lading issued or cases where a switching carrier is the first carrier and the trunk line issues the bill of lading. The question then arises as to which is the initial carrier within the meaning of the Cummins Amendment. Two shipments of cattle originated on the line of the Southern Pacific in Arizona, and billed by the initial carrier for through transportation to Denver. When they were received at El Paso on the Rio Grande, El Paso and Santa Fe R. R., such company issued new bills of lading for reshipment from El Paso to Denver. Held, that the original bills issued by the Southern Pacific Company governed the entire transportation and the liability of the initial carrier was not altered by the issuance of the two bills.<sup>9</sup> The court said (pp. 982, 983): "Upon the arrival of the first shipment at the Denver railroad yards, the Atchison, Topeka & Santa Fe turned the same over to the Colorado & Southern Railway Company to be switched to the Denver stockyards for unloading. There is evidence that some damage thereafter occurred while the cattle were in the possession of the Colorado & Southern. The Atchison complains of the refusal of an instruction that it was not liable for death or injury occurring while the cattle were being switched by the Colorado & Southern. The record discloses that the Colorado & Southern does the switching to the stockyards for the Atchison at Denver. It thus was not acting as a connecting carrier, but as the agent of the Atchison in this

*held* a contract for through shipment between points within the state within the meaning of Rev. St. 1911, art. 731, relating to shipment contracts, notwithstanding the bill provided it was not to be treated as a through shipment to a point off company's road. (State shipment.) *Missouri, K. & T. Ry. Co. of Texas v. Baker Bros.* (Tex. 1919), 210 S. W. 244.

Where live stock was shipped over the lines of connecting carriers, but each carrier made an independent contract with the shipper, defendant, which was the initial carrier, limit-

ing its liability to its own line, and the transportation being intrastate only, Rev. St. 1911, arts. 731, 732, relating to contracts for through shipment recognized or acquiesced in by the carriers, had no application, and defendant was not liable for damages accruing upon the lines of the connecting carriers. (State shipment.) *Chicago, R. I. & G. Ry. Co. v. Hallam* (Tex. 1919), 211 S. W. 809.

9. *Rio Grande E. P. & S. F. Ry. v. Kraft & Madero* (Tex. 1919), 212 S. W. 981.

switching movement. The charge was properly refused. *Wilburn v. Railway Co.*, 148 Mo. App. 692, 129 S. W. 484; *Railway Co. v. Jackson*, 55 Tex. Civ. App. 407, 118 S. W. 853; *Railway Co. v. Scoggin*, 40 Tex. Civ. App. 526, 90 S. W. 521; *Railway Co. v. Phillips*, 197 S. W. 1031. \* \* \* We pass now to the consideration of the appeal of the Southern Pacific Company. Its first assignment is predicated upon the theory that the court erred in submitting any issue of liability on the part of the Southern Pacific Company, because the uncontroverted evidence discloses that all of the damage to the two shipments occurred after they had passed from its possession at El Paso, at which point they were received by the Rio Grande, El Paso & Santa Fe, which issued new bills of lading for transportation from El Paso to Denver. The circumstances under which these second bills were issued is not disclosed by the record. It appears that the Southern Pacific Company, the initial carrier, issued bills of lading for through transportation from the points of origin to Denver. Since these were interstate shipments, the terms of the original bills issued by the Southern Pacific Company govern the entire transportation, and the liability of the initial carrier was not altered by the issuance of the second bills by the Rio Grande, El Paso & Santa Fe Railway Company at El Paso, *Missouri, K. & T. Ry. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213. Under the federal law the Southern Pacific Company, as the initial carrier, was liable to the appellees for any damage accruing upon the line of any of the connecting carriers. There is, therefore, no merit in this assignment. \* \* \* The third assignment proceeds upon the theory that the Southern Pacific Company could not be held liable for any injury accruing to the shipment after its arrival at Denver and while they were being switched to the Denver stockyards by the Colorado & Southern Railway. As has been heretofore indicated, when the first shipment reached the Denver railroad yards the Atchison Company turned the same over to the Colorado & Southern to be switched to the stockyards for unloading. The Colorado & Southern in this matter acted, not as a connecting carrier, but as the agent of the Atchison in making the switching operation. The duty of the carriers in this case did not terminate upon the mere arrival of the shipment in the

railroad yards at Denver. It was their duty to deliver the same in Denver at the proper unloading place, which, of course, was the stockyards, and not the railroad yards. Therefore the liability of the Southern Pacific Company, as the initial carrier, did not terminate until the shipments had been delivered at the stockyards in Denver, and there was therefore no error in refusing a charge which relieved it from liability for damage accruing while the cars were being switched from the railroad yards of the Atchison Company in Denver to the stockyards." It has been held under the Carmack Amendment and the Cummins Amendment that if an interstate shipment of freight is begun under an express contract of carriage between the initial carrier and the shipper, and subsequently a connecting carrier on the route of the shipment beyond the terminal of the initial carrier issues another contract of carriage to the shipper for a remaining portion of the original route, and takes up the original bill of lading evidencing the original contract, upon its surrender by the shipper the second contract of carriage does not supersede the first, which remains in force by virtue of the federal statute law, and the shipper and all assignees claiming through him, all of whom could have enforced the original contract, have no right of action for damages against the subsequent carrier, but only against the initial carrier.<sup>10</sup> Claimant bought live stock, which had been shipped from Wyoming to Chicago, and reconsigned to North Carolina under an order notify bill of lading. It appears that tariffs on lines east of Chicago permitted the movement of live stock on order notify bills of lading. While the stock was held in Chicago the claimant surrendered the original bill of lading, and secured a new one consigning the stock to the agent of the C. & O. Railroad at Norfolk, Va. When the stock arrived in Virginia they were badly damaged, some of them having their legs broken, and some of them dead. Suit was brought against the Chesapeake & Ohio R. R. Co., which issued the exchange bill of lading at Chicago, as the initial carrier. It was contended that suit could only be brought against the Union Pacific R. R., which issued

10. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

the original bill of lading in Wyoming. The court said:<sup>11</sup> "The evidence for defendant showed the fact that the said stock was received by the Union Pacific Railroad Company at Medicine Bow, Wyo., on September 24, 1916, for the through interstate transportation aforesaid; that such contract of shipment was legal and valid for that portion of the route from Medicine Bow to Chicago, but that because of a regulation of the Eastern tariff filed with the Interstate Commerce Commission according to law, which regulation governed all railroads operating east of Chicago, the defendant was not permitted to receive said shipment of live stock at Chicago for transportation from thence to Windsor, N. C., and that for that reason it was not received by the defendant at Chicago for such continued shipment under the 'order notify' bill of lading contract. The 'order notify' bill of lading aforesaid contained a provision making it obligatory on the shipper to 'furnish to go with the stock' (for the purpose of loading and unloading, caring for, feeding and watering it, 'until delivery of same to consignee at destination') 'one or more attendants,' and further provided that 'if the shipper fails to furnish such attendant, or if the latter neglects to perform

11. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1910), 95 S. E. 454, 462.

The Interstate Commerce Act amended by the Carmack Amendment and the Cummins Amendment of 1915, as amended by Act Aug. 9, 1916, did not prohibit a tariff regulation prohibiting the movement of live stock on shipper's order contract, that is, on an order notify bill of lading, east of Chicago, the regulation applying to all carriage of live stock freight on the lines of all common carriers east of Chicago; such regulations, though it incidentally breaks, interrupts, and stops an originally intended through and continuous shipment of live stock freight from points west of Chicago to points east, is not forbidden, because section 7 of the

act permits a break in good faith for a necessary purpose and without intent to avoid or unnecessarily interrupt the continuous carriage or to evade the provisions of the act, and the first carrier east of Chicago is the initial carrier within the commerce act. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

If the initial contract of carriage covering an interstate shipment was invalid as a contract of carriage east of Chicago, then a second contract might be made by a connecting carrier subjecting it to the liability, under the Interstate Commerce Act, as amended, of an initial carrier. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

said duties, whatever shall be done by the carrier in respect to the handling and care of the stock in transit shall be considered as done at the request and as the representative of the shipper, and at the risk and expense of the shipper.' There are two grounds of defense relied on by the defendant, upon appeal, namely: (1) That under the facts of this case the initial carrier was the Union Pacific Railroad Company, as fixed by the federal statute of February 4, 1887 (24 St. at L. 379, c. 104, 3 Fed. Stat. Anno. p. 809 et seq.), designated 'An act to regulate commerce,' as amended by the Carmack Amendment of June 29, 1906 (34 St. at L. 594, c. 3591, Fed. Stat. Anno. Supp. 1909, p. 273) and by the Cummins Amendment of March 4, 1915 (38 St. at L. 1196, c. 176, Fed. Stat. Anno. Supp. 1916, p. 124), and by Act August 9, 1916, c. 301, 39 Stat. 441, amending the Cummins Amendment, that there can be but one initial carrier of an interstate shipment falling within the provisions of said federal statute law, which alone must be sued for such damages as are claimed in the instant case; that the shipment in the instant case fell within such provisions, and hence that the plaintiff has sued the wrong defendant; that the plaintiff has no cause of action against the defendant in the instant case; and hence its demurrer to evidence should have been sustained by the trial court. (2) That if this be not a sound legal position, under the facts of the instant case it appears that persons accompanied the stock to take care of, feed, and water it; that in such case the burden of proof to show the cause of the injury of the stock was upon the plaintiff; that the plaintiff introduced no proof, and there is none in the record, to show that the cause of the injury to the stock was the negligence of the defendant or its connecting carriers; and hence also the demurrer to evidence should have been sustained by the trial court. The federal statute law above cited, so far as material, is as follows: The Carmack Amendment, so far as material, reads: 'That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to

which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company, on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.' 34 St. at L. 594, Fed. St. Anno. Supp. 1909, p. 273, U. S. Comp. St. 1916 §§ 8604a, 8604aa. The Cummins Amendment, so far as material, reads. 'That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, or the District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company \* \* \* so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state, or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been

issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided, further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided, further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.' 38 St. at L. 1196, Federal St., Anno. Supplement, 1916, p. 124, U. S. Comp. St. 1916, § 8604a. The provision of the amendment which is added to the Cummins Amendment by Act. Cong. Aug. 9, 1916 (U. S. Comp. St. 1916, § 8604a) reads: 'Provided, however, that the provisions hereof respecting lia-

bility for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery, or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply; first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to value, be held to be a violation of section ten of this act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in case where rates dependent upon and varying with declared or agreed value would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary live stock" shall include all cattle, swine, sheep, goats, horses, and mules except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.' Section 7 of the Interstate Commerce Act (U. S. Comp. St. 1916, § 8571) aforesaid, which remains unaffected by said amendments, provides as follows: 'That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stop-

page, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.' \* \* \* 1. Was the defendant, under the facts of this case, the initial carrier, as contemplated by the federal statute law above mentioned? As bearing on this question we will, in the outset, state certain general propositions about which there is no serious question made in argument before us, which are as follows: In every case of an action for damages for breach of contract or breach of duty by a common carrier of freight to carry it safely, whether in assumpsit on the contract, or in tort for breach of duty, the right of action is dependent upon the existence of a contract of carriage between the plaintiff and defendant at the time the alleged cause of action arose (10 C. J. § 130, p. 110); which contract, however, need not have been an express contract, but may have arisen from the duty imposed at common law or by statute, state or federal, in which case the contract will be implied in law from the duty imposed by the common law or by statute. It is immaterial, therefore, whether the action in the instant case was in assumpsit or in tort. The right of the plaintiff to maintain such an action, whether in assumpsit or in tort, depends, in the last analysis, on the existence of a contract of carriage between the plaintiff and defendant, either in fact or implied in law, at the time the alleged cause of action arose, and further upon such contract being an enforceable one under the law. Prior to the Carmack Amendment, above quoted, there were many conflicting decisions as to the circumstances from which the contract on which the right of action depended would be implied at common law, when it was for a through transportation of property designated to a point beyond the terminus of the receiving carrier's line. As said in *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, at page 198, 31 Sup. Ct. 164, at page 167, 55 L. Ed. 167, at page 179, 31 L. R. A. (N. S.) 7, at page 24: 'Congress by the act here involved [the Carmack Amendment] has declared, in substance, that the act of receiving property for transportation to a point in another state and beyond the line of the receiving carrier shall impose on such receiving carrier the obligation of through transportation, with carrier lia-

bility throughout. Again (219 U. S., at page 206, 31 Sup. Ct. at page 170, 55 L. Ed., at page 182, 31 L. R. A. [N. S.] at page 36), in this opinion of the United States Supreme Court in the case last cited, it is said: 'In substance Congress has said to such carriers: "If you receive articles for transportation from a point in one state to a place in another [state] beyond your own terminal, you must do so under a contract to transport to the place designated."' Since the Congress has occupied the whole field of interstate commerce by virtue of the federal statutes aforesaid, those statutes have superseded all state legislation on the subject, and they and their construction must be alone looked to in the ascertainment of the rights of parties litigant in all actions, such as that in the instant case, involving an interstate shipment. Further: The settled construction of the federal statute law aforesaid is that if an interstate shipment of freight is begun under an express contract of carriage between the initial carrier and the shipper, and subsequently a connecting carrier, en route of the shipment, beyond the terminal of the initial carrier, issues another contract of carriage to the shipper for a remaining portion of the original route and takes up the original bill of lading evidencing the original contract upon its surrender by the shipper, the second contract of carriage does not supersede the first, and in such case the first contract remains in force by virtue of said federal statute law, and the shipper and all assignees of his claiming through him (all of whom could have enforced such original contract) have no right of action for damages against such subsequent carrier, but only against the initial carrier. In such case there can be, in contemplation of law, but one initial carrier, and no action by the shipper or one claiming under him can be maintained, against any subsequent carrier en route, although instituted upon a subsequent contract of carriage with the latter, such as that aforesaid. *Atlantic C. L. R. R. Co. v. Riverside Mills*, supra; *Looney v. Oregon Short Line R. R.*, 271 Ill. 538, 111 N. E. 509; *Hudson v. Chicago, etc., R. Co.* (D. C.) 226 Fed. 38; *W. H. Alton Piano Co. v. Chicago, etc., R. Co.*, 152 Wis. 156, 139 N. W. 743; *Atchison, etc., R. Co. v. Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050. And the same would be true if the initial contract of carriage were not an express

contract, but one implied in law because of the duty imposed by the federal statute, where the initial carrier received the shipment for interstate transportation to a destination beyond the terminal of its line. *Hudson v. Chicago, etc., R. Co.*, supra. Such holding is based, however, upon the fundamental consideration that in such cases the initial contract of carriage was one which was enforceable by the plaintiff under the federal statute, as covering the entire route of the original shipment; that any subsequent contract of carriage with any intermediate carrier was needless, was not required in such case by the federal statute, and was against its policy, which was (as stated in *Hudson v. Chicago, etc., R. Co.*, supra) 'to secure simplicity in the transportation of freight carried by several common carriers—as the Supreme Court expresses it, "unity of transportation with unity of responsibility \* \* \* by localizing the responsible carrier"' (quoting from the case of *Atlantic C. L. R. R. Co. v. Riverside Mills*, supra). Further dealing with the question of the proper consideration of the Carmack Amendment, the court in the *Hudson v. Chicago, etc., R. Co. Case*, supra, said: 'Now if this is the purpose of the amendment, the question arises: Would that purpose be effected by requiring each one, we will say, of seven connecting common carriers in an interstate shipment to issue a separate bill of lading? If this were done, we would have, on plaintiff's theory, seven common carriers, six of whom would stand in the position of principals to succeeding carriers, and also six in the position of agents of the preceding carriers. All seven of them would stand in the position of principals, so far as their own lines of railway were concerned. Instead of having localized the remedy, it would needlessly expand it. \* \* \* If the Carmack Amendment does not compel the intermediate carrier to issue a bill of lading, then the obligation cannot be assumed by the intermediate carrier by the issuance of a bill of lading; for that would be allowing the intermediate carrier to give at its option special privileges to a shipper. \* \* \* So it seems to me that neither in the absence of a bill of lading, nor by issuing a bill of lading, can the intermediate carrier be held liable for loss or damage occurring on the line of the succeeding carrier.' The first transaction has already settled the rela-

tion between the owner of the goods and the carrier, and fixed the duties and liabilities of the carrier to such owner. A contract afterwards entered into between the shipper and another carrier manifestly cannot affect these duties and liabilities. In all of the cases above cited, however, the plaintiff, either as a party to it or as assignee of the shipper who was such a party, could have enforced his claim of damages under the original contract, if the subsequent contract had not been made—there was no stoppage or interruption of the continuous carriage of the freight under the initial contract, made for any necessary purpose; hence the subsequent contract did not fall within the permission given in section 7 of the Interstate Commerce Act to make it, and the making of it was in effect prohibited by the Carmack Amendment. And subsequent amendments made such prohibition even more explicit. But for such prohibitory effect of federal statute law, such cases would, of course, have held otherwise than they did, where the subsequent contract of carriage was in fact made without duress. We come now to the consideration of the controverted question above stated. The defendant relies on the authorities above referred to to sustain its position that in the instant case the Union Pacific Railroad was the initial carrier, and could alone be sued by the plaintiff in the instant case. The defendant especially relies on the case of *Atchison, etc., R. Co. v. Harold*, *supra*, to sustain the position that a change of consignee does not affect the matter. As to the last-named case the following should be said: Neither change of title to the goods (*Gulf Railway Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540) nor change of consignee while the goods are in transit does, of itself, affect the matter; but a change of contract (which is not invalid because prohibited by the federal statute law aforesaid), by the substitution of a different contract from the initial contract, may affect the matter, and will, and, upon principle, must of necessity do so. For, as we have noted above, such an action as that in the instant case can be maintained only as based directly or indirectly upon a contract of carriage existing between the plaintiff and defendant at the time the alleged cause of action arose. If then there was a subsequent contract between the parties to the action which was by them both sub-

stituted for a former contract of carriage of the same freight between other parties, and such second contract was not forbidden by law, the action must of necessity be based on the latter contract. If indeed the latter contract was forbidden by law and the former contract was by force of statute law continued in existence, then, and then only, the action should be based on the former contract. The pivotal question, therefore, just at this point in our consideration of the instant case is this: Was the second contract of carriage forbidden by law? This, in turn, depends upon the further question: Was the tariff regulation aforesaid forbidden by the federal statutes aforesaid, as to shipment of live stock from points west of Chicago to points east of that place? Now, clearly, such tariff regulation was not expressly forbidden by said federal statutes. If forbidden at all it must have been by implication. The tariff regulation applied to all carriage of live stock freight on the lines of all common carriers east of Chicago on 'order notify' bills of lading. The tariff regulation was unquestionably legal and valid as to all such shipments originating at and east of Chicago. Its object plainly was merely to abolish 'order notify' bills of lading contracts of carriage of the stock in the territory east of Chicago. It is not contended that this object was not in itself lawful. The contention is that the tariff regulation was unlawful as to shipments of live stock from points west of Chicago originally destined to points east of that place on 'order notify' bills of lading, because such tariff regulation incidentally breaks, interrupts, and stops such an originally intended through and continuous interstate carriage of freight. The latter position manifestly depends upon whether the federal statutes aforesaid forbid and break, interruption, or stoppage in every originally intended through and continuous interstate carriage of freight, which has once begun, without exception. Now we see from the provisions of section 7 of such statute law above quoted that this is not so. Such a break, stoppage, or interruption as may be 'made in good faith for \* \* \* (a) necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade the provisions of the act' is not forbidden by such statute law. We think that the reasonable construction of said

federal statute is that the tariff regulation aforesaid was not forbidden thereby to the extent of the incidental effect aforesaid; that the break, stoppage, or interruption at Chicago of the originally intended through transportation from Medicine Bow in the instant case being made not 'with any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any provision' of the statute law aforesaid, but solely in order not to interfere with said tariff regulation, it was for a 'necessary purpose' in contemplation of such statute. That, therefore, the first contract of carriage in evidence was invalid as a contract of carriage east of Chicago, and hence that the second contract of carriage was not forbidden by law, but was a lawful and valid contract. Taking up now the consideration of the cases cited and relied on for defendant as above noted upon the question under consideration, we deem it sufficient to say that the principle on which those cases were decided does not lead to the conclusion that the second contract of carriage in the instant case was forbidden by the federal statute law. The instant case was not one where the transportation could have proceeded east of Chicago under the first contract of carriage. It was not a case where there was no necessity for a change of that contract into a new and different contract. The invalidity of the first contract under the lawful tariff regulation aforesaid was a sufficient justification of the defendant for requiring a new and different contract of carriage. The latter contract having been in fact entered into, and being a legal and valid contract, it superseded the former contract of carriage. It is urged upon our consideration by defendant that the "order notify" bill of lading being illegal as a contract of carriage east of Chicago, it was to that extent a void contract; that a void contract is no contract, and that hence the case stands as if no express contract had been made with the Union Pacific Railroad; that in such case the mere receiving of the stock by such railroad for transportation to Windsor, N. C., constituted it the initial carrier for the entire route. This position, however, overlooks the consideration that what we are asked to resolve into a fact by construction was not a fact, and cannot be implied or considered as existing consistently with the actual facts. If, indeed, no express contract had been made with the Union Pa-

cific Railroad Company, and the stock had been received by it for transportation as aforesaid, that state of facts would undoubtedly have constituted it the initial carrier for the entire route to Windsor, N. C.; and the Union Pacific Railroad could alone have been sued by the plaintiff, notwithstanding any subsequent contract of carriage made between the plaintiff and an intermediate connecting carrier. But in such case there would have been no need for any such subsequent contract; the contract implied in law from the duty imposed on the Union Pacific Railroad Company by said federal statute law would have been ample to have obligated it for the carriage of the freight for the entire route (by itself and through its connecting carriers as its agents). And in such case no connecting carrier would have had the lawful right to refuse such carriage on the ground that it would have been under an invalid contract. But the case before us is, as aforesaid, a very different one. The conclusion, therefore, necessarily follows that the defendant, and not the Union Pacific Railroad Company, under the facts in the instant case, was the initial carrier, as contemplated by the federal statute law above cited. Hence it follows that the defendant was the proper defendant to the action in the instant suit for the injury and damage complained of in the declaration, whether caused by it on its own line, or by some connecting carrier en route from Chicago to Windsor, N. C. Now at common law, upon the proof merely of delivery to a common carrier of inanimate goods for transportation and the proof of their nondelivery, the law implies that they have been lost by the negligence of the common carrier or by reason of some cause for which it is responsible, and the plaintiff suing for damages occasioned by such loss is relieved of the burden of proof of the cause of the loss. This rule applies to the initial carrier of inanimate goods under the federal statute law aforesaid. *Galveston, etc., R. Co. v. Wallace*, supra. As there said: "The carrier and its agents (the connecting carriers), having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy or some cause against which

it might lawfully contract, it was for the carrier to bring itself within such exception." (1) In the case of loss of inanimate freight it is not questioned by defendant that the common-law rule stated in the quotation above from the case of *Galveston, etc., R. Co. v. Wallace*, *supra*, applies, and that the same common-law rule applies to injury and consequent loss or damage arising from injury to inanimate freight, and to any defense by such carrier, relying on exemption from liability in damages for injury to such freight by reason of any exception to the common-law rule provided by contract. The burden of proof in such case is on the carrier to prove that the injury falls within the exception contained in the special contract relied on by the defendant. 6 Cyc. 519, 520; 10 C. J. \*577, pp. 574, 575. In the case of animate freight, however, there has been much diversity of opinion as to whether the common-law rules applicable to inanimate freight exist in their entirety—whether the same burden of proof aforesaid rests upon the carrier in the event of loss of or injury to animate freight as to inanimate freight. (2) In considering this question no reference to the statute in Virginia or the rules of decision in Virginia or elsewhere on this subject, with respect to intrastate shipments, would be of any help in arriving at a right conclusion, since the liability for damages in the instant case is governed by the federal statute law, and the common-law rules applicable thereto as accepted and applied in federal tribunals must govern. *Cincinnati, etc., R. Co. v. Rankin*, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265. Hence such statute and decisions will not be referred to. When we come to consider the common-law rules under discussion as accepted and applied in federal tribunals with respect to injury to animate freight, to wit, live stock, in a case where a contract exception is relied on as a defense, whatever may be the difference in other of such rules as applicable to animate as distinguished from inanimate freight, there seems to be no room for valid dissent from the conclusion that the burden of proof, at the least, which is required of it in that behalf, is on the carrier in two particulars, namely: (a) It must prove that, at the time the injury may have occurred, the special contract exception relied on was in operation; and (b) it must at least prove (unless such fact appears

from the plaintiff's evidence) that the injury was of such a nature that it may, with equal probability, in accordance with the evidence, have been occasioned by causes which were within the contract exception relied on. 6 Cyc. 524; 10 C. J. § 581, p. 379. Certainly this is true where the proof of the plaintiff shows that the injury was due to human agency. 6 Cyc. 524. In the instant case, while there was evidence for defendant to the contrary, there was ample evidence for plaintiff to establish the fact that the injury to the stock complained of was due to human agency, as appears from the statement of facts above, and on the demurrer to evidence this court must consider such as the fact in the instant case. In the instant case the defendant relies on the special contract exception from liability contained in the contract of carriage with the Union Pacific Railroad, quoted in the above statement of facts, and also on the special contract exception from liability contained in the contract of carriage with the defendant, also quoted in the above statement of facts. Since, for this reason above stated, this action is not based upon the former contract, the exception from liability clause thereof cannot be relied on by the defendant. This leaves the defense under consideration entirely dependent upon such clause of the latter contract of carriage. Now, since the burden of proof at the least which is required of it, as above noted, is upon the defendant in both of the particulars above mentioned, if the defendant has failed in its proof in either particular, such failure is fatal to its defense now under consideration. It is urged upon our consideration by defendant that the testimony for the plaintiff, when read in connection with certain entries on the contract of carriage with defendant, shows that the stock was accompanied by persons in charge of it within the meaning of clause 5 thereof, relied on by defendant, so that such exception clause was put in operation in the instant case, whereas it is urged on the part of the plaintiff that the fact in question is not directly proved, but that it is a mere inference, which the defendant, as demurrant to the evidence has deprived itself of the right to draw; but, as we shall presently see, it is unnecessary for us in the instant case to pass upon that controverted question. Nor is it necessary for us to consider the ground of defense mentioned in the above statement of the case, to wit,

that the burden of proof to show the cause of the injury to the stock was on the plaintiff because the stock was accompanied by persons to take care of, feed and water it. It is not necessary for us to consider such ground of defense because such burden of proof, if it were conceded to exist, did not arise, unless the defendant had at least shown by a preponderance of the evidence which can be considered by us that the injury to the stock was of such a nature that it may, with equal probability as aforesaid, have been occasioned by causes which were within the exception from liability clause of the contract aforesaid on which such ground of defense rests. This, as aforesaid, we shall presently see the defendant has failed to do. The pivotal question then, upon which the defense under consideration turns, and upon which its decision depends in the instant case, is therefore, the following: 2. Has the defendant sustained the burden of proof resting upon it, at the least which is required of it in that behalf, to show by a preponderance of evidence (b) that the injury to the stock was of such a nature that it may, with equal probability in accordance with the evidence in the case, have been occasioned by causes which were within the exception from liability clause aforesaid of the contract of carriage with defendant? The exception from liability clause aforesaid of the contract of carriage with defendant, above quoted, is as follows: "Sec. 5. The shipper at his own risk and expense shall load and unload said live stock and in case any person shall accompany said live stock in charge of the same, [shall] take care of, feed and water said live stock while being transported, whether delayed in transit or otherwise. \* \* \*"

Now the evidence for plaintiff (as noted in the above statement of facts) was direct and positive that the cars containing the stock were not overcrowded or overloaded; that the stock was in sound and good condition when delivered to defendant for transportation; that the injury to it apparent on its arrival at its destination was of such nature that the jury were warranted in drawing the inference of fact that such injury was not occasioned by negligence in loading or unloading or in lack of care of it by any person accompanying the stock in charge of it, or from lack of feed or water. There was evidence for defendant, it is true, in conflict with that of the plaintiff on this

question, but on the demurrer to evidence such conflicting evidence cannot be considered by us. It is therefore manifest that in the instant case the defendant has not proved by any evidence which is before us that the injury complained of in the declaration was of such a nature that it may with equal probability as aforesaid have been occasioned by causes which were within the exception from liability clause of the contract aforesaid relied on by defendant. On the contrary, the evidence for the plaintiff, as we must consider it, establishes the affirmative fact that such injury was of such nature that it was not occasioned by causes within such exception. The question last above stated must therefore be answered in the negative." So the carrier which issues an exchange bill of lading may be held liable as an initial carrier under the Cummins Amendment.<sup>12</sup>

**Connecting Carriers.** Liability of connecting carriers in an interstate shipment of goods is governed by federal statutes and law of carriers as construed by federal courts.<sup>13</sup> Where a connecting carrier transporting a shipment of live stock delivers it to another road acting as its agent, and not as a connecting carrier to be switched to stockyards for unloading at destination, the initial carrier is liable for injuries sustained during such switching operations; the destination of the shipment being the stockyards, and not the railroad yards.<sup>14</sup>

13. *Ocean S. S. Co. of Savannah v. People's Shoe Co.* (Ala. 1919), 81 So. 241.

12. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454, 462.

It was not error for the court, in a suit by a shipper for damages to a shipment of cabbage, to instruct a verdict in favor of a connecting carrier, where there was no evidence of negligence on the part of such connecting carrier. *Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son*, 212 S. W. 530.

14. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Medareo* (Tex. 1919), 212 S. W. 981.

Where cattle were shipped by initial carrier and other connecting carrier, the initial carrier was liable for the entire damages sustained in the shipment; but each of the connecting carriers was liable only for such damages as may have resulted in consequence of its own negligence. *Ft. Worth & D. C. Ry. Co. v. Hill* (Tex. 1919), 213 S. W. 952.

**Delivering Carrier.** However, the terminal carrier is only liable for such injury as it has caused itself, and if it shows that the goods were in bad condition when delivered to it, and that it was not guilty of negligence or that it aggravated or contributed to the injury it has exonerated itself from liability. There is a presumption against a terminal carrier which delivers goods in bad condition that the damage occurred on its own line, though it may have transported the goods over its line in the same through and sealed car in which it received them.<sup>15</sup>

15. *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Tex. 1919), 212 S. W. 208.

Where a shipment of goods is to pass through the hands of several carriers in order to reach destination, the various carriers on the through line over which the shipment is to pass make a joint contract whereby a bill of lading is given at the point of origin for the receiving company as well as others on which any company is such line of through traffic can be sued. *Reidsville Paper Box Co. v. Southern Ry.* (N. C. 1919), 99 S. E. 23.

Where a shipment passes through the hands of several carriers and the last carrier presents a freight bill therefor and receipts it, it does so as agent, not only for itself, but for all the carriers among whom the freight charges are to be apportioned. *Reidsville Paper Box Co. v. Southern Ry.* (N. C. 1919), 99 S. E. 23.

The terminal carrier of an interstate shipment under the standard form bill of lading issued under order No. 787 of the Interstate Commerce Commission of June 27, 1908, pursuant to the Carmack Amendment of the Interstate Commerce Act, held required to respond only for such damages as occurred to the shipment

on its own line, despite the consignees' allegation that the terminal and initial carrier were partners, and the amendment to the Carmack Amendment on March 4, 1915, subsequent to the contract of shipment. *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Tex. 1919), 212 S. W. 208.

Under a standard form bill of lading issued on an interstate shipment under an order of the Interstate Commerce Commission pursuant to the Carmack Amendment of the Interstate Commerce Act, such bill providing no carrier should be liable for loss not occurring on its own road or its portion of the through route, if damage to the shipment occurred before it came on the terminal carrier's line, the consignees' damages must be apportioned in their action as against the terminal carrier; the initial carrier having been dismissed for insufficient service. *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Tex. 1919), 212 S. W. 208.

"Granting then, as must be done under the above conclusions, that the rights and obligations of these litigants were to be determined by the provisions of a federal law which required the terminal carrier to respond in such damages only as occurred upon its own line (*C. R. Fuel Co. v.*

I. C. Ry. Co., 178 Iowa, 878, 160 N. W. 353, and authorities there cited), does it follow, under the facts here developed, that appellee was precluded from any recovery at all? We think not, for this reason: Irrespective of where the burden of proof lay, the evidence below was sufficient to support a finding, not only that appellant received the shipment in good condition, but that all the damage occurred upon its own line. The rule upon this subject seems to be as follows:

"Where the goods are received by the initial carrier in good condition, they are presumed to remain so, and, where they are subsequently delivered to the consignee by the terminal carrier in a damaged condition, the presumption is that the injury occurred on its own line, and a prima facie case is made against the delivering carrier. Evidence that goods were in a damaged condition when tendered by a terminal carrier makes a prima facie case against it for the entire amount of damage, which is not overcome by simply showing that the goods were damaged to some extent, the amount of which is not shown, when they were delivered to it. The terminal carrier has the burden of separating the damage sustained before it received them from that in-

flicted while the goods were in its charge.' Moore on Carriers, pp. 467, 468, and 469.

"Neither is this presumption against the terminal carrier delivering goods in bad condition changed or modified by the fact that it may have transported them over its own line in the same through and sealed car which it received them. *St. Louis S. F. & T. R. Co. v. Fenley*, 118 S. W. 845; *Texas & N. O. Ry. Co. v. Brown*, 37 S. W. 785; *Gulf, Colorado & S. F. Ry. Co. v. Edloff*, 89 Tex. 454, 34 S. W. 414, 35 S. W. 145; *Leo v. St. Paul M. & R. Co.*, 30 Minn. 438, 15 N. W. 872; *Colbath v. Bangor & A. R. Co.*, 105 Me. 379, 74 Atl. 918, 134 Am. St. Rep. 569; *Beede v. Wisconsin C. R. Co.*, 90 Minn. 36, 95 N. W. 454, 101 Am. St. Rep. 390.

"But even if the rule were held to be different in interstate shipments controlled by the term of the Carmack Amendment, and that in such cases the party seeking damages against another than the initial carrier must allege and prove that the damage occurred upon the line of the one recovered against, the case here made is still thought to have been sufficient." *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Tex. 1919), 212 S. W. 209.

## CHAPTER VI.

### ACTS RELIEVING CARRIER OF LIABILITY.

**In General.** A common carrier cannot by contract, avoid liability for loss or damage to freight caused by its own negligence or that of its servants (state shipment).<sup>1</sup> A clause in a contract of carriage, "the responsibility of the company is limited to \$50 for any article together with the contents thereof," referred to the carrier's responsibility as a carrier, and did not include misfeasance or nonfeasance of the carrier itself, or its employes, and the carrier was liable for the full face value of articles stolen by employes.<sup>2</sup> Where a common carrier desires by special contract to exonerate itself from the effects of its own acts or omissions, or those of its employes, the special contract must openly express that intention, so that it cannot be in the slightest degree misunderstood.<sup>3</sup> The burden of proof is on the carrier sued for injury to inanimate freight to prove that the injury to the freight falls within an exception from liability contained in the special contract covering the shipment relied on by the carrier.<sup>4</sup>

**Fault of Shipper.** Claimant delivered to the carrier a steam-shovel moving on its own wheels, and the equipment for the

1. *Southern Pac. Co. v. Haug* (Nev. 1919), 182 Pac. 92.

2. *Heuman v. M. H. Powers Co.* (N. Y. 1919), 123 N. E. 373.

3. *Heuman v. M. H. Powers Co.* (N. Y. 1919), 123 N. E. 373.

The federal rule is that in case of injury to an interstate shipment of live stock, where a contract exception is relied on as a defense by the carrier, the burden of proof at least is on the carrier in two particulars—first, to prove that when the injury may have occurred the special contract exception was in operation; second, that the injury was of such

a nature that it may have been occasioned by causes within the contract exception, certainly where plaintiff's proof shows the injury was due to human agency. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

Where a bill of lading exempts carrier from liability for loss by fire of cotton shipped, burden of proof is on shipper to show negligence of carrier avoiding the exemption. *E. Borneman & o. v. New Orleans, M. & C. R. Co.* (La. 1919), 81 So. 882.

4. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

same, which was loaded on an ordinary flat car. The shovel was inspected by the carrier's car inspector and car foreman before it was accepted for shipment, and certain defects that were discovered were repaired, and the shovel then accepted for shipment. It was connected up with one of the freight trains consisting of an engine, 26 cars and a caboose, and the 6th car ahead of the caboose, which was the last one, was the shovel car. The equipment was just behind the shovel car. The engineer saw dust on the track, and thinking something was wrong set the brakes sharply. The shovel car and the equipment car behind it were derailed and damaged. It appeared that the train was making from 20 to 25 miles per hour over the best track the company had, a little bit down hill, all new steel, and on good ballast. It seems that there were two old brakes in the end sill of the shovel car, and that the cracks of these could not be discovered by ordinary inspection, and before the shovel car was accepted for shipment. Held that the verdict of the jury for the injury to the car resulted from defects, which existing at the time the car was offered for shipment, would not be reversed on appeal.<sup>5</sup>

**Inherent Character of Shipment.** A carrier is not liable for injury caused through the inherent character of the shipment. Although inherent vices of animals will excuse their loss by the carrier, yet it is the duty of a carrier to save them from their own inherent qualities if he can do so by the exercise of ordinary care.<sup>6</sup>

5. *Burke Const. Co. v. St. Louis & S. F. Ry. Co.*, (Ark. 1919), 214 S. W. 13.

6. *Boyd v. St. Louis Express Co.* (Mo. 1919), 211 S. W. 702.

A carrier is not an insurer in the transportation of live stock, and is liable only for injuries caused by its negligence, not being legally responsible for injuries resulting from the natural vice or the nature and propensities of the animals carried. *Gulf,*

*C. & S. F. Ry. Co. v. Helms Bros.* (Tex. 1919), 210 S. W. 853.

The defense that loss was caused by the evil propensities of live freight, or by the act of the public enemy, or by the act of God, need not be referred to in the petition, but should be set up in the answer. *Boyd v. St. Louis Express Co.* (Mo. 1919), 211 S. W. 702.

The defenses that loss was caused by the evil propensities of live freight, or by the act of the public

**Act of God.** An act of God, which releases a carrier of goods from its liability for loss, is one resulting from such force in nature as could not reasonably have been foreseen and provided against.<sup>7</sup>

enemy, or by the act of God, will not be allowed if the loss as to which they are pleaded might nevertheless have been avoided by reasonable care or effort by the carrier. *Boyd v. St. Louis Express Co.* (Mo. 1919), 211 S. W. 702.

Where express company, sued for loss of hog, did not plead the defense that the loss was caused by inherent viciousness or propensities of the hog, defendant had no right to show it or claim protection from it, unless it appeared in the testimony of plaintiff. *Boyd v. St. Louis Express Co.* (Mo. 1919), 211 S. W. 702.

Where the one shipping a hog by an express company did not accompany the hog in its transit, the burden of excusing the loss of the hog by showing that it died from its inherent viciousness or propensities was upon defendant express company. *Boyd v. St. Louis Express Co.* (Mo. 1919), 211 S. W. 702.

7. *Mistrot Calahan Co. v. Missouri K. & T. Ry. Co. of Texas* (Tex. 1919), 209 S. W. 775.

The fact that a flood is extraordinary or unprecedented will not relieve a carrier from liability for loss or injury to his shipment if by reasonable diligence it could have been prevented. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1919), 209 S. W. 775, 776.

"If the defendant proves that the loss occurred by the act of God,<sup>1</sup> as is

alleged in the instant case (or by reason of either of the above-named exceptions), the burden shifts to the plaintiff to prove that, notwithstanding such act of God, the negligence of the defendant was the proximate cause of the loss. *Ry Co. v. Bergman*, 64 S. W. 999; *Elam v. Ry. Co.*, 117 Mo. App. 453, 93 S. W. 852; *Express Co. v. Duncan*, 193 S. W. 411; *Davis v. Ry. Co.*, 89 Mo. 340, 1 S. W. 327; *Ry. Co. v. Reeves*, 10 Wall. 189 (77 U. S.) 19 L. Ed. 909.

This is true for the reason that, if the loss does not occur by reason of one of the excepted causes, the carrier is an insurer, and negligence on its part is not an issue. But, by proving that the loss occurred by reason of an act of God, it takes itself out of the class of insurer, and the plaintiff must then, as in ordinary cases, prove that the loss occurred by reason of the negligence of the carrier." *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1919), 209 S. W. 775, 776.

The fact that a storm was unprecedented would not relieve a carrier from liability for loss of goods, where, after storm had begun and water was rising in docks so that there was apparent danger that they would reach and injure the goods, the carrier could by use of reasonable diligence have removed goods to a place of safety. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1919), 209 S. W. 775.

Refusal of instruction requested by initial carrier in suit by shipper as to the act of God in destroying the cabbage shipped was not error, where the decayed condition of the cabbage

was not traced to low temperature, and there was no fact sustaining such a theory. Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son, 212 S.W. 530.

## CHAPTER VII.

### FILING OF CLAIM.

**Notice of Loss.** The Cummins Amendment Aug. 9, 1916, to the Interstate Commerce Act prevents carriers on interstate shipments from contracting with shippers for notice of claims of amount of loss, damage, or injury to subject matter of shipment in a shorter time than 90 days, or for filing claims in a shorter period than 4 months, or for institution of suits on claims for a shorter period than 2 years.<sup>1</sup> In view of the Cummins Amend-

1. *Missouri Pacific R. Co. v. Martindale* (Ark. 1919), 213 S.W. 777.

The design of the Carmack Amendment was to avoid all possibility of discrimination by the carrier in dealing with shippers, and hence a carrier cannot waive a contract provision requiring all claims for damage or delay to be made in writing within four months after delivery, as to do so would open the board to preferences and to discriminations between shippers. *Fay v. Chicago, R. I. & P. Ry. Co.* (Ia. 1919), 173 N.W. 69.

A shipper of live stock is bound by provision of the contract, signed by him with the second carrier, requiring notice of injury to stock, if he had opportunity to read the contract before signing it, though he testified he had a previous oral contract with the initial carrier for the shipment to final destination. *San Antonio & A. P. Ry. Co. v. Miller* (Tex. 1919), 213 S.W. 734.

To recover for damage to cattle in transit, it is the shipper's only burden to establish by a preponderance of the evidence an injury to the cattle and the amount thereof. *St.*

*L., I. M. & S. R. Co. v. Pape*, 100 Ark. 269, 140 S.W. 265; *K. C. Sou. Ry. Co. v. Morrison*, 103 Ark. 552, 146 S.W. 853; *K. C. Sou. Ry. Co. v. Mabry*, 112 Ark. 110, 165 S.W. 279. Appellant has cited the case of *S. L. S.W. Ry. Co. v. Burnett*, not reported in the Arkansas reports, but reported in 174 S.W. 1165, in support of its contention that a shipper must prove damage to the cattle shipped, resulting from negligent delay by the carrier, before a recovery can be had. The court said:

"Again, it is contended by appellant that the provision in its contract requiring appellee to give written notice of the loss or injury in time to have examined the cattle before they were removed from the unloading pens was binding upon appellee as to damages for injuries and shrinkage in weight, and that his failure to give such notice must work a reversal of the judgment. Appellant has cited Arkansas cases upholding such provisions in contracts as reasonable, and that shippers of stock must comply with them as a prerequisite to recovering damages for loss occasioned by injuries and

ment, under a bill of lading providing that, except where loss is due to damage while loading or unloading, or damaged in transit by carelessness, claims must be made in writing at point of delivery or origin within four months after delivery, and that suits for loss or damage in transit, notice of which is not required, and which are not made in writing to the carrier within four months as above specified, shall be instituted only within two years after deliv-

shrinkage in weight of the cattle while in transit. These cases were predicated upon the law as it stood prior to the Cummins Amendment of August 9, 1916, to the Inter-State Commerce Act (chapter 301, 39 Stat. 441 [U. S. Comp. St. §8604a]), which is as follows:

"That it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years; provided, however, that if the loss, damage of injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

213 S. W. 779.

"Our interpretation of this amendment is that it prevents the carriers on interstate shipments from contracting with shippers for notice of claims on account of loss, damage or injury to the subject-matter of the shipment in a shorter time than 90 days, or for filing claims in a shorter period than four months, or for the institution of suits on claims for a shorter period than two years. The

language is plain and unambiguous. The object and purpose of the act was to protect shippers against the short time for giving notices of claims on account of loss, damage or injury to the subject of shipment imposed by carriers on them in bills of lading or contracts of shipment. Appellant, however, seeks to uphold the contract clause in the instant case because it applies to a notice regarding loss or injury, and not to a notice of claim. In other words, it is asserted that the Cummins amendment only prevents carriers from contracting for a notice of the claim in a shorter period than 90 days, and does not affect their right to contract for a notice regarding loss or injury. The claim must necessarily be founded upon the loss or injury, and the word 'claim' used in the amendment is broad enough to cover loss or injury. Any other construction would deprive the shipper of the protection intended by the act. We can see no good reason for preventing a carrier from contracting for a notice of claim in a shorter period than 90 days and permitting it to contract for notice of loss or injury when the shipment reaches its destination. We do not think the statute intended such a distinction." *Missouri Pac. R. Co. v. Martindale*, 213 S. W. 779.

ery, in cases not involving damage in transit, notice of claim must be filed with the carrier within four months as specified; the two year limitation not applying in such cases where the notice is filed, but being governed by the local statutes as to the bringing of such actions, and in all other cases suit must be instituted within two years.<sup>2</sup> That is, the court holds that under the new form of bill of lading, the two year limitation does not apply to cases where notice of claim is filed with the carrier, if such claims are not the kind referred to in the proviso to the Cummins Amendment. The Cummins Amendment Aug. 9, 1916, to the Interstate Commerce Act, prohibiting carriers from contracting for a notice of claim in a shorter period than 90 days, is applicable to notice regarding loss or injury, since the claim must be founded upon loss or injury, and the word "claim" being broad enough to cover loss or injury.<sup>3</sup> It seems to be decided that where the injury was due to negligence in transit no notice of claim needs to be given as to the preliminary of bringing suit. In *Bell v. New York Cent. R. Co.*, 175 N. Y. S. 712, the court said, p. 713: "This suit is brought to recover \$286.20 damages to a shipment of pears consigned from Rochester, N. Y., to Scranton, Pa., over the line of the defendant's railroad, as

2. *Bell v. New York Cent. R. Co.*, 175 N. Y. S. 712.

3. *Missouri Pac. R. Co. v. Martin-dale* (Ark. 1919), 213 S.W. 777.

"The value of the casting in question upon the day of shipment was proven at \$14, and the plaintiff has permitted to recover in addition upon his claim for special damages because of the delay or failure to deliver. It is claimed by the defendant that upon the authority of *Chapman v. Fargo*, 223 N. Y. 32, 119 N. E. 76, L. R. A. 1918F, 1049, Ann. Cas. 1918E, 1054, the plaintiff's profs were not sufficient to entitle him to recover. I deem it unnecessary to pass specifically upon that point, because I consider that the lack of proof of damage is such that no damages under the special agreement were established. Whatever the

facts with reference to the profs may have been, the return does not show anything warranting special damages. The proof does show that a casting worth \$14 was delivered to the defendant for shipment on April 24, 1918; that it should have arrived at its destination the following day; that it did not in fact arrive there until 'some time in July,' when plaintiff refused to accept it, and testified that it then had no value. This evidence is uncontradicted, and, I think, clearly entitles the verdict to stand for that amount. The suggestion that the 'casting' had some value as junk has no particular force, as there is nothing in the case to show what the casting was made of, or, if it had any value at all, it was more than nominal." *Gifford v. Fargo*, 176 N. Y. S., 568, 572.

initial carrier. The pears were unreasonably delayed in transit, the car was not properly placed for delivery, and several of the barrels and baskets containing the pears were broken open and the contents crushed and bruised. The defense is that the suit was barred because not brought within two years. This defense is based upon the allegation that section 3 of the form of bill of lading had been amended by a supplement to the official classification, so that the section, as amended read: 'Except in cases where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, claims must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Suits for recovery of claims for loss or damage, notice of which is not required, and which are not made in writing to the carrier within four months as above specified, shall be instituted only within two years after delivery of the property, or, in case of failure to make delivery, then within two years after a reasonable time for delivery has elapsed. No claims not in suit will be paid after the lapse of two years as above, unless made in writing to the carrier within four months as above specified.' This bill of lading provision was promulgated pursuant to the provision of the first Cummins Amendment to the Interstate Commerce Act (Act Feb. 4, 1887, c.104, § 20, 24 Stat. 595), which was approved March 4, 1915 (38 Stat. 1196, c. 176 [U. S. Comp. St. § 8604a]), the pertinent clause of which reads as follows: 'Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim or filing of claim shall be required as a condition precedent to recovery.' It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of

claims, to-wit: (1) Those for loss due to delay or damage while being loaded or unloaded or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call nontransit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a nontransit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of claims as a condition precedent to recovery, but authorized a requirement that suit be instituted within two years. In the bill of lading provision adopted under the authority of the amendment, we find first the requirement for the filing of a claim in nontransit cases within four months, which is a condition precedent to recovery. No provision whatever is made limiting the time within which suit may be instituted in the case of nontransit losses where claims are filed. The next sentence has for its purpose the fixing of a two-year limitation for the institution of suit in transit cases, and prescribes the period as two years. It reads: 'Suits for recovery of claims for loss or damage, notice of which is not required, and which are not made in writing to the carrier within four months as above specified, shall be instituted only within two years,' etc. It is obvious that the claim in suit is within the class which we have called for brevity the transit cases, and that therefore it is one for a loss of which notice is not required, and for which a claim does not have to be filed in writing. Indeed, in such a case a requirement for either notice of loss or filing a written claim would be illegal under the Cummins Amendment. The controversy hinges over what force is to be given and what meaning ascribed to the conjuncture clause: 'And which are not made in writing to the carrier within four months as above specified.' It is contended by the appellant that, taking the provision as a whole, this clause should be construed to mean that to bar a claim two conditions must occur, namely: (1) That notice is not required; and (2) that notice is not given—in other words, that, where notice is given, the two-year limitation does not apply, and that, as the plea of limitations does not allege that the notice was not given, the defense is insufficient. It is argued with some force that there is no apparent

reason why there should be a two-year limitation in the case of suits for transit losses, where notice has been given, and a six-year limitation in cases of nontransit losses, where notice has been given. This argument is an aid to interpretation, but is not controlling, if the plain sense of the words employed is to the contrary. It is contended that, if the provision means that in all cases of transit loss suit must be begun within two years, the words 'and which are not made in writing to the carrier within four months as above specified' are superfluous, as all such cases would be embraced within the clause 'notice of which is not required.' It is then plausibly argued that we must give some force to the words 'and which are not made in writing,' etc., and that the only meaning to be ascribed is, the conjunctive 'and' being used, that the limitation does not apply in the case of a transit loss claim for which is made in writing within four months. Such, I think, would be the fair interpretation, considering the bungling wording of the whole provision, and the facts that it was drawn by the carrier and is being used in derogation of plaintiffs' rights, but for the language of the Cummins Amendment. Counsel have failed to note the differentiation in the Cummins Amendment made between 'notice of claims' and 'filing of claims.' The former, which may be more or less informal, must be given within ninety days; the latter, which has to be formal and precise, is not required within a shorter period than four months. In drawing this provision in the bill of lading, beginning, 'Suits for recovery of claims for loss or damage, notice of which is not required, and which are not made in writing,' etc., the draftsman was clearly endeavoring to prescribe a limitation for the institution of suits in transit loss cases. Instead of referring to them in the language previously employed, and making the provision read, 'Suits for recovery of claims for loss or damage due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, shall be instituted only within two years,' etc., the draftsman attempted to cover all such cases by a description. Turning to the Cummins Amendment, it was obviously noted that in transit loss cases neither 'notice of claims' nor 'filing of claims' is required, so the clause was made to read: 'Suits for recovery of claims for loss or damage, notice of which is not required,

and which are not made in writing to the carrier,' etc. The words 'notice of which is not required' refer to the 'notice of claims' to be **given** within ninety days. The words 'and which are not made in writing' refer to '**filing** of claims,' which must be done within four months. Thus suits for loss or damage, of which notice of claims and filing claims are not required, refer to and solely embrace transit loss cases. The meaning of the provision in the bill of lading therefore is this: In nontransit cases, notice of claim must be filed with the carrier within four months, as specified, which is a condition precedent to recovery. In such cases, where the notice of claim is filed, the short statute of limitations does not apply. In all other cases, namely, transit loss cases, suit must be instituted within two years." Failure to notify a common carrier that there was a safe in a cabinet containing valuable articles did not relieve carrier from liability where its servants broke into the safe and stole the valuable articles.<sup>4</sup>

4. *Heuman v. M. H. Powers Co.* (N. Y. 1919), 123 N. E. 373.

"The appellees recovered \$125, in compensation for expenditures for extra feed and labor in the transportation of the cattle required as a result of the negligent delay. There was no evidence introduced to show that the charges so paid for such extra feed and labor were reasonable. Under this state of the evidence, no recovery for these items could be had. *T. & P. Ry. Co. v. Powell*, 34 Tex. Civ. App. 575, 79 S.W. 86; *Rapid Transit Co. v. Williams*, 136 S. W. 267; *G., H. & H. Ry. Co. v. Hodnet*, 155 S.W. 678; *Tarrant County Traction Co. v. Bradshaw*, 185 S.W. 951." *Ft. Worth & D. C. Ry. Co. v. Hill* (Tex. 1919), 213 S.W. 952, 953.

In an action against a carrier for injuries to horses, allowance of damages by reason of extra feed and pasture paid for by the shipper on account of injuries was not sup-

ported by evidence, where there was no testimony what the cost to feed the horses would have been had they not been injured. *Lancaster v. Whittle* (Tex. 1919), 210 S.W. 334.

In an action against a carrier for damages to mules in transit, cost of feed and care after injury, and price afterward received for them at a point other than destination, had no proper place in applying the true measure of damages. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* (Tex. 1919), 210 S.W. 853.

In an action for injuries to a shipment of horses released to a value of \$150 each, the question arose whether such released valuation was the limit of the claimant's recovery or whether, in addition, he could recover the freight charges, the services of a veterinary, medicine and treatment for the horses and the expense of caring for the horses for a period of about two months follow-

ing the accident in which they were more than the animals' value. The horses were delivered at destination. *Held*, that the shipment having been delivered, the claimant was not entitled to recover freight charges; that the stipulation carrying the released rate did not necessarily preclude the claimant from recovering more for reason of their injuries than their released value. The court said:

"If expenditures made in an effort to restore to usefulness an injured animal are to be charged against the person whose negligence caused the injury, on the ground that he has been benefited by them through a reduction of damages, it is obvious that the total recovery should not exceed the value of the animal. But, if the plaintiff may recover for money spent in an honest, but unsuccessful, effort to improve the condition of his animal, not because the defendant actually derives any benefit therefrom, but because the expenditure was made in good faith in hopes of such an effect, then an allowance on that account would seem permissible, even although it resulted in a recovery in excess of the full value of the animal, whatever he has expended in a reasonable effort to save it. 1 R. C. L. 1195; note 5 Ann. Cas. 416, second column; *Ft. Worth & D. C. Ry. Co. v. Jordan* (Tex. Civ. App.), 155 S. W. 676. But, while such an expenditure, to be chargeable against the defendant, need not have actually inured to his benefit, it must have been incurred in reasonable effort to accomplish a result that would have that effect. Here no expenses for the care of any of the injured animals can be charged against the defendant unless they

were made in the reasonable expectation, not merely of improving the condition of the horse, but of improving it so much that the impairment in its value would be less than \$150, since otherwise the defendant would have no concern in the matter."

In an action against a carrier for damages on account of injury to an animal in transit, where delivery was made at the point of destination, the plaintiff cannot recover for freight charges paid, although the animal was so injured as to be entirely worthless, and the amount of recovery was limited by the value stated in the bill of lading, and where an animal has been killed or rendered entirely worthless by an injury, a recovery may sometimes be had in excess of its value by reason of money spent in an unsuccessful, but reasonable, effort to restore it to usefulness, but this can be true only of expenditures made in a just expectation of reducing the carrier's liability by the amount expended; and where the recovery is based upon the valuation placed on the animal in the shipping contract, the expectation must be that the recoverable damages will be reduced below that amount. *Kennedy v. Atchison, T. & S. F. Ry. Co.* (Kans. 1919), 181 Pac. 117.

For breach of contract to deliver to plaintiff daily during a period of five years a specified quantity of logs the measure of damages is the difference, if any, between the contract price and the price at which logs could, by reasonable diligence, have been procured elsewhere. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

**Waiver of Notice.** The terminal carrier of an interstate shipment by rail, when sued for damage to the shipment, could not waive the provision as to damages in the standard form bill of lading issued as required by an order of the Interstate Commerce Commission pursuant to the Carmack Amendment.<sup>5</sup>

Upon the destruction of a stock of farm machinery by fire, the owner's measure of damages was not the market value of the goods at the place where destroyed, because, in view of the owner's selling, storage, and insurance expenses, payment of commissions, discount from list price for cash, unsold goods depreciation, etc., the market price is not what the owner would have obtained if it had been permitted to sell the goods. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N.W. 471, 472.

In an action for a stock of goods destroyed by fire, evidence held to show that a list of the goods destroyed, with value placed thereon by the plaintiff, did not show the actual value of the goods, but an arbitrary value, being but a statement of the price set upon the goods to be charged therefor by its agents. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N.W. 471, 473.

5. *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Tex. 1919), 212 S.W. 208.

## CHAPTER VIII.

### MEASURE OF DAMAGES.

In all cases for loss or damage to a shipment of freight the measure of damages must be based upon the market value at destination. The correct measure of damages is the difference between the value of the shipment at destination in good condition at the time it should have arrived, and the actual value of the shipment in the condition it was when it did arrive. Very frequently claims are based upon invoice price at destination, freight charges, cost of reconditioning, tracing and incidental expenses of that character. This is obviously only a clumsy method of arriving at the different items mentioned in the rule above. If the market value of the commodity at the time it should have arrived is ascertained, it is obvious that this automatically takes care of such items as the freight, the invoice, commission for selling, teaming and other matters of that kind. If also the value of the shipment in its damaged condition is ascertained at destination and a claim is made up of the difference between such value and the value in good condition then such items as reconditioning and the like are also taken care of. A claim presented in this way is easy for the carrier to investigate and certainly entails a great deal less effort on the part of the claimant. However, market value is only a criterion of real value of an article when it is sold in an open competitive market.<sup>1</sup> In an action by a shipper against a carrier for injuries to horses, shipper cannot recover both the difference in market value of horses and money paid for feed expended while the horses were recovering from injuries.<sup>2</sup> A judgment for \$14 for delay in the delivery of a casting shipped by plaintiff should be permitted to stand on the theory that the action was for negligence, from which defendant was not absolved by a condition of shipping receipt that plaintiff's claim should be made in writing.<sup>3</sup>

1. International Harvester Co. v. Chicago, M. & St. P. Ry. Co. (Ia. 1919), 172 N. W. 471, 473.

2. Lancaster v. Whittle (Tex. 1919), 210 S. W. 334.

3. Gifford v. Fargo, 176 N. Y. S., 568.

Loss to fruit from imperfect refrigeration was damage for which a carrier was liable under a provision in bill of lading that the amount of "any" loss or damage for which it was liable should be computed on basis of value of property at place and time of shipment.<sup>4</sup> A shipper suing carrier for damages to live stock shipment cannot recover for expenditures for extra feed and labor necessitated by negligent delay, in absence of evidence that the charges paid for such feed and labor were reasonable.<sup>5</sup> Claimant had three cars of potatoes held in the produce yard at Pittsburgh waiting reconsignment, and telephoned the Vandalia agent and desired the cars diverted to Chicago. Agent stated that he would immediately wire diversion. Instead of the agent wiring the reconsignment orders they were mailed, so that cars did not arrive in Chicago until the following Thursday, instead of Monday as they would have arrived had reconsignment reached Pittsburgh on Saturday, the day it was telephoned. The market was lower on Thursday and suit was brought for the difference in the value. The question was raised that the facts presented the case of an oral agreement to reconsign which was a special contract prohibited by the Interstate Commerce Act.<sup>6</sup> The court held "under the act, a published tariff, so long as it is in force, has the effect of a statute and is binding alike on carrier and shipper. *Pennsylvania Ry. Co. v. International Coal Co.*, 230 U. S. 184, loc. cit. 197, 33 Supt. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. And with respect to the services governed by the act, the rule that both carrier and shipper are bound by and cannot alter the terms of service as fixed by the filed regulations applies, not only to rates, but also to other stipulations relating to service and facilities within the purview of the act. *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836. And the effect to be given the provisions of an interstate shipping contract is governed by the decisions of the federal courts, and state courts are bound to follow their rules. *Clegg v. St. Louis, etc., Ry. Co.*, 203 Fed. 971, 122 C. C. A. 273; *Hamilton v. Chi-*

4. *Grenshaw Bros. & Shaffold v. Hill* (Tex. 1919), 213 S. W. 952.  
*Southern Pacific Co.* (Calif. 1919).

181 Pac. 252.

6. *Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co.*, 213 S. W.

5. *Ft. Worth & D. C. Ry. Co. v.* 533.

chicago, etc., Ry. Co., 177 Mo. App. 145, 164 S. W. 248; Bailey v. Mo. Pac. Ry. Co., 184 Mo. App. 457, 171 S. W. 44; Dunlap v. Chicago, etc., Ry. Co., 187 Mo. App. 201, 172 S. W. 1178. Under our federal laws, the shipper is bound to take notice of the filed tariff rates, and, so long as they remain operative, they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. Atchison, Topeka & Santa Fe Ry. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; Kansas City & Southern Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683. And no oral agreement can be given a prevailing effect which will be contrary to the filed schedule, in that to do so would open the door to special contracts and defeat the primary purposes of the Interstate Commerce Act, which requires equal terms to all shippers and the charging to all of but one rate and that rate filed, as required by the act. Atchison, Topeka & Santa Fe Ry. Co. v. Robinson, supra; Kansas City & Southern Ry. Co. v. Carl, supra. We have found no authority, and have been cited none, which holds that there is a common-law duty on the part of the carrier to re-consign or divert cars in transit upon request of the shipper 'immediately by wire,' and, as we read the record before us, it is barren of any testimony directly bearing upon the question as to what the prevailing custom, if any, may be on the part of carriers when directed to re-consign or divert cars in transit—whether it is customary for the carrier to carry out such request by mail or by wire. The provisions covering diversions as set out in the tariff on file with the Interstate Commerce Commission, and in effect during all the period that the transportation of the cars in question is involved, filed by the New York, Pennsylvania & Norfolk Railroad Company, the initial carrier, a copy of which tariff, duly certified to by the secretary of the Interstate Commerce Commission, was introduced in evidence on the part of the defendant below, and provides: '(1) Carload tariff which has been changed from the original to a new destination prior to arrival at the original destination will be known as a diversion: Upon receipt of written request prior to arrival at original destination the carrier will make reasonable effort to accomplish the change desired but will not be responsible in

the event of failure on the part of any of its employees to accomplish such diversion.' Therefore, in the absence of testimony as to the customary manner of handling reconsigning or diverting cars on the part of the carrier, and in light of the provisions regarding diversions, filed with the Interstate Commerce Commission by the initial carrier, which we hold governs the diversion or reconsigning of the cars in this case, we come to the conclusion that plaintiff failed to make out a case sufficient to go to the jury, unless it be that we can hold the plaintiff has made out a case under its theory of a special contract, which was the theory upon which the learned trial judge submitted the case to the jury. As we have stated above, it is not within the power of the carrier to give, at its option, special privileges to a shipper; any services contemplated to be done by the carrier must be equally applicable to all shippers under like circumstances, and such services must be stated in its filed tariff under the provisions of the act to regulate commerce. We concede it is within the power of the carrier, for a consideration, to contract for such special services as it is here claimed were agreed upon between the plaintiff and defendant, provided the carrier makes and publishes a rate for such services open to all. So far as can be determined from this record, this was not done, but rather: 'The shipper \* \* \* was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particularly expedited service, and a remedy for a delay not due to negligence. An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.' *Chicago & Alton Ry. Co. v. Kirby*, 225 U. S. 155, loc. cit. 165, 32 Sup. Ct. 648, loc. cit. 650 (56 L. Ed. 1033, Ann. Cas. 1914A, 501). The alleged breach of the special contract sought to be relied upon by plaintiff in the instant case, when stripped of extrinsic matters, resolves itself to simply this: That defendant did not divert the cars out of Pittsburgh by wire so as to have them go by a particular train. In other words, plaintiff

seeks to enforce a special agreement by which, according to plaintiff's interpretation thereof, the carrier guaranteed to cause plaintiff's cars to be immediately diverted by wire so that they would leave Pittsburgh by the evening train and arrive in Chicago Monday morning. This the defendant could not do; it was tantamount to an agreement (if made) on the part of the carrier 'to guarantee a particular connection and transportation by a particular train,' so as 'to give an advantage or preference not open to all and not provided for in the published tariffs.' *Chicago & Alton Ry. Co. v. Kirby*, *supra*. Whether plaintiff could have recovered upon the carrier's contract to divert or reconsign with reasonable dispatch or within reasonable time is a matter that is not presented to us by this record. As we have stated above, plaintiff treated its petition as based upon the breach of a special contract alone, as is evidenced by all the testimony and the instructions in the case." That an implement dealer had competition in sale of his goods does not make price list of his goods the measure of their value in determining his damages for destruction of the goods by fire.<sup>7</sup> No rule of the law of damages permits the injured party to receive more than he has lost.<sup>8</sup> The basis of all damage rules is a fair compensation to the loser with the least burden to the one who caused the loss.<sup>9</sup> In an implement dealer's action for damages for

7. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 473.

8. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

9. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

If a carrier destroys live stock, measure of damages is not replacement of other cattle, because it would be difficult or impossible to get just such cattle as were destroyed, and because replacement would not compensate shipper if he sustained loss because of inability to get the

cattle shipped to a favorable market. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471.

Shipper's measure of damage for carrier's delay is difference between price shipper was forced to take by reason of delay and price he would have received if there had been no delay. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

In tort damages may be recovered that were not, and in reason could not be, anticipated, so long as such damages could result from the tort and were in fact caused by it. *International Harvester Co. v. Chicago,*

destruction of goods by fire, the measure of damages is the reasonable cost of replacement, and not the market value of goods at place where situated, as evidenced by the implement dealer's price list, since such prices, in view of the dealer's expenditures for storage, insurance, cost of distribution, and sale in time and money, is not the amount that dealer would have received for goods if they had not been destroyed.<sup>10</sup>

**Limitation of Liability.** Under the Cummins Amendment a common carrier of interstate commerce is required to obtain, by order of the Interstate Commerce Commission, the right to adopt alternative rates based on declared values of the shipment, and, the carrier not having done so, the shipper is not restricted, in an action to recover for loss of the shipment, to such declared value.<sup>11</sup> Claimant shipped fur coats worth over \$1500 by

M. & St. P. Ry. Co. (Ia. 1919), 172 N. W. 471, 472.

Damages for breach of contract are limited to what the parties intended and to injuries that could in reason be anticipated. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

10. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

It is the duty of the injured party to do all he may in reason do to reduce the damages. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

Upon the seller's breach of contract to deliver lumber, buyer cannot recover special damages for loss of profits on a resale already made, for such damage might have been avoided by replacing the undelivered lumber by other of like kinds. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

In an action against railroad for loss of goods by fire negligently set, defendant's offered instructions as to determination of value of goods destroyed *held* not a concession that if plaintiff, as seller, had not arbitrarily fixed the price on such goods, then value might be established by plaintiff's selling price. *International Harvester Co. of America v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471.

11. *Western Assur. Co. v. Wells Fargo & Co.* (Minn. 1919), 173 N. W. 402.

A rather unusual holding has been made in Texas. The consignees of onion sets shipped in interstate commerce could recover from the terminal carrier for damage only on the basis of the bona fide invoice price of the property, including freight charges, if prepaid, as its value, as stipulated by the standard form bill of lading issued by the initial carrier in compliance with order No. 787 of the Interstate Commerce Commission, dated June 27, 1908, pursuant to

express from St. Paul, Minn., to Montana. In the express receipt was a limitation of liability of \$50.00, which the claimant contended under the Cummins Act must have been authorized by the Interstate Commerce Commission, and had not been, whereas the express company contended that such lower rate liability had been authorized by the Interstate Commerce Commission prior to the passage of the Cummins Amendment. The court held that the Cummins Amendment was not retroactive, and the limitation of liability not having been authorized by the Commission was void and the claimant was entitled to recover the full amount. The court said:<sup>12</sup> "It is obvious from a reading of the foregoing amendment that it was the purpose of Congress to abolish the rule established by the courts restricting liabilities to the valuation upon which the rate paid was based. *McCaull-Dinsmore Co. v. Railway Co.* (D. C.) 252 Fed. 664; *In Re The Cummins Amendment*, 33 Interst. Com. Comm. R. 682. Under that amendment the contract upon which the defendant claims the plaintiff's damages were limited in this case was void and of no effect. The Cummins Amendment was conditionally qualified by a subsequent act of Congress passed August 9, 1916. U. S. Comp. Stat. § 8604a. As bearing upon this amendment the holding of the Interstate Commerce Commission in *Williams Co. v. Hartford & New York Transportation Co.*, 48 Interst. Com. Comm. R. 269, decided January 7, 1918, seems to be decisive of the case at bar. It is there stated that—"By the amendment of August 9, 1916, the proviso last referred to was amended so as to provide that the provisions respecting liability for full actual loss, damage, or injury and declaring any limitation thereof to be unlawful and void shall not apply to baggage or to property, except ordinary live stock, on which the carrier has been or shall thereafter be authorized or required by order of the commission to establish and maintain rates dependent upon the value

the Carmack Amendment, despite the consignees' allegation that the terminal and initial carriers were copartners, and despite the amendment of the Carmack Amendment on March 4, 1915, subsequent to the contract of

carriage. *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Tex. 1919), 212 S. W. 208.

12. *Western Assur. Co. v. Wells Fargo & Co.* (Minn. 1919), 173 N. W. 404.

declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of the act. The rates assailed were in effect on August 9, 1916. No authority has ever been granted by us for their publication in terms of value.' Under this rule the plaintiff in this action is entitled to recover the full value of the lost package regardless of the contract limitation relied upon by the defendant, unless it appears that the Interstate Commerce Commission, prior to the shipment, had made an order authorizing the carrier to enter into a contract limiting its liability in this particular class of cases. It follows that, the defendant being required to obtain, by order of the Interstate Commerce Commission, the right to adopt alternative rates based on declared or stated values of the shipment, and it not appearing to have done so, the decision that the plaintiff is restricted in its recovery to such stated value of the shipment is not warranted by the facts in the case, and a new trial must be granted." On re-hearing the court said: "In denying defendant's application for a rehearing in this cause we take occasion to say, that there may be no misunderstanding as to the position of the court in the matter, that in our view of the question a prospective operation and effect must be given to the clause found in the Cummins Amendment of August 9, 1916, to the effect that the declared liability of the carriers for the actual loss shall not apply to contracts of limitation authorized by order of the Interstate Commerce Commission. That proviso or exception should not be construed to apply to orders made by the Commission prior to the amendment of March 4, 1915." There still are a good many cases coming down with relation to limitation of liability on claims arising prior to the Cummins Amendment.<sup>13</sup> Where

13. Clause in bill of lading exempting carrier from liability in case of destruction by fire of the cotton shipped is not forbidden by the Carmack Amendment; a reduced rate being the consideration, and no neg-

ligence of carrier being shown. *E. Borneman & Co. v. New Orleans, M. & C. R. Co.* (La. 1919), 81 So. 882.

It is sufficient consideration for limitation of liability in case cotton shipped is destroyed by fire that bill

of lading recites a reduced rate, and that in only one case had the carrier ever charged a higher rate than the one charged held immaterial. *E. Borneman & Co. v. New Orleans, M. & C. R. Co.* (La. 1919), 81 So. 882.

Under the Carmack Amendment, in interstate shipment of racing mare, shipper paying alternative rate based on \$150 valuation of mare, the valuation limited the amount the shipper could recover for damage to her for any defaults of carriers in transport, whether result of ordinary or gross negligence, as defined in law of state of suit and destination. *Bassett v. Chicago & N. W. Ry. Co.* (Wisc. 1919), 171 N. W. 749.

Before a carrier can successfully claim the benefit of limitation from full liability in a bill of lading, wherein the rate for transportation is determined by weight, the essential choice between an ad valorem rate and a rate by weight must be made to appear. *Mariani Bros. v. Thomas Wilson, Sons & Co.*, 177 N. Y. S. 335.

In a shipper's action for loss of part of a shipment, wherein the carrier set up a limitation of liability, the burden was on plaintiff to show that he had been refused an alternative rate by the carrier, or that an alternative rate was not in existence. *Mariani Bros. v. Thomas Wilson, Sons & Co.*, 177 N. Y. S. 335.

A bill of lading covering olive oil shipped by the barrel, and limiting the carrier's liability to £20 per barrel, held valid, under Harter Act, §§ 1, 2. *Mariani Bros. v. Thomas Wilson, Sons & Co.*, 177 N. Y. C. 335.

The limitation of the amount of the carrier's liability for loss is a matter of contract. A limitation in a schedule of rates published and filed as required by statute is not effective

for the purpose if not assented to by the shipper. *Ferris v. Minneapolis & St. L. Ry. Co.* (Minn. 1919), 173 N. W. 178 (state case).

Limitation of liability for loss or injury to shipment occurring on the line of a connecting carrier is invalid under the Carmack Amendment, authorizing action against a receiving carrier which by section 8604aa is given its remedy over against the carrier causing the loss. *Reidsville Paper Box Co. v. Southern Ry.* (N. C. 1919), 99 S. E. 23.

While it is permissible to limit shipper's recovery, in case of carrier's liability, to a valuation of the freight agreed upon or declared by the shipper, such right of limitation must be shown or declared by the established and filed classifications and schedule of rates and charges. *Burke v. Union Pac. R. Co.* (N. Y. 1919), 124 N. E. 119.

The doctrine that an agreed valuation, when made the basis for a rate, is given effect in measuring the damages and limiting the shipper's recovery, was not abrogated or changed by the Carmack Amendment. *Burke v. Union Pac. R. R. Co.* (N. Y. 1919), 124 N. E. 119.

Stipulations for an agreed value, when made the basis for the rate, are not agreements for exemptions from negligence, and are given effect upon the ground of estoppel. *Burke v. Union Pac. R. R. Co.* (N. Y. 1919), 124 N. E. 119.

The validity of a contract limiting the carrier's liability to an agreed valuation does not depend upon the relation of that value to the actual value, but rests upon the proposition that, by freely and deliberately electing to contract for carriage at a rate of compensation based upon an

a bill of lading, duly delivered and accepted, declares that lawful alternate rates based on specified values were offered, such declaration constitutes an admission by the shipper, and sufficient prima facie evidence of choice.<sup>14</sup>

**Where Shipment Has No Market Value.** Occasionally claims arise with reference to some shipment which has no distinct market value, and while such cases are rare they do not change the general rule governing the measure of damages nor relieve the carrier from liability. Where cotton that was damaged by fire before it was shipped was lost in transit by the carrier it was held the mere fact that there is no market quotation on the cotton exchange for burnt cotton will not exclude recovery. It is competent evidence for a dealer in cotton to testify that there is a market for the burnt cotton, such market price being based upon the market price of good cotton and ex-

agreed value, the shipper is estopped to claim a higher value in case the shipment is lost or destroyed. *Burke v. Union Pac. R. R. Co.* (N. Y. 1919), 124 N. E. 119.

The agreed valuation is valid and effective as the extent of a loss only when it is related to the rate charged for transportation, for the shipper cannot be estopped by an agreement or declaration concerning value which in no way or extent affected the tariff or conduct of the carrier, and the essential choice of rates must be made to appear before a carrier can successfully claim the benefit of the agreed valuation limitation and relief from full liability. *Burke v. Union Pac. R. R. Co.* (N. Y. 1919), 124 N. E. 119.

A railroad's contract fixing a valuation on intrastate shipment negligently destroyed held void, where property's actual value was greater. (State shipment.) *Southern Pac. Co. v. Haug* (Nev. 1919), 182 Pac. 92.

In action by intrastate shipper of a

stallion in Kansas, under the declared valuation on which the rate was based, an instruction was erroneous which submitted to the jury the question of whether the shipper knowingly accepted the reduced rate based on the declared value; the shipper's knowledge of the lawful rate being conclusively presumed by Kansas law, which controlled. *Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

In view of General Statutes of Kansas 1915, § 8435, under the order of May 1, 1901, of the Board of Railroad Commissioners of Kansas, where the intrastate shipper of a stallion in Kansas declared a valuation, and so obtained a lower rate, provision in shipping contract limiting liability to amount of declared valuation was valid, and shipper cannot recover in excess of the amount. *Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

14. *Burke v. Union Pac. R. R.* (N. Y. 1919), 124 N. E. 119, 120.

pense of reconditioning burnt cotton.<sup>15</sup> Claimant brought suit for the value of certain cotton destroyed in transit by fire. It appears that claimant bought some cotton that had been on fire, and shipped the same. A rule of the Interstate Commerce Commission provided that burnt cotton must not be offered or accepted for shipment until it had been reconditioned, or until not less than five days have elapsed since last evidence of fire in it. In this case cotton was shipped six days after evidence of fire. Held, that the fact that cotton was destroyed by fire in transit would not relieve the carrier from the burden of a presumption that cotton had been lost through negligence, a burden cast upon it to show that fire and consequently failure to deliver cotton was due not through his fault, but to the claimant's fault. That, testimony as to the value of the cotton at destination at the time it should have arrived was competent and a verdict of the jury in favor of the claimant must be upheld.<sup>16</sup>

**Special Damages.** Special damages cannot be recovered from a carrier in the absence of notice to it that such damages will accrue if it is negligent in transporting the shipment.<sup>17</sup>

**Interest.** In some states interest is allowed in a suit for loss and damage.<sup>18</sup>

15. *Southern Ry. Co. v. Pettit*, 257 Fed. 663, 666.

16. *Southern Ry. Co. v. Pettit*, 257 Fed. 663.

17. Special damages cannot be recovered for loss of sales and subscriptions because of defendant's inability to print frontispiece, though defendant went to dealers, and could not find similar paper, where there is no proof that such paper could not usually be found, or could not be manufactured in time, or that defendants could not find paper answering the purpose. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

In an action against a carrier for

damage to an asphalt plant transported by it and wrecked in transit, no recovery could be had for overhead expenses due to the enforced idleness of plaintiff's workmen, such item of damages not being in contemplation of the parties. *West Const. Co. v. Seaboard Air Line Ry. Co.* (Tenn. 1919), 210 S. W. 663.

18. In an action against a carrier for damages to an asphalt plant in transit, it was within the discretion of the chancellor to allow interest on cost of repairs paid by complainant, recovery of which was sought from carrier. *West Coast Co. v. Seaboard Air Line Ry. Co.* (Tenn. 1919), 210 S. W. 633.

Claimant shipped an asphalt plant from Bartow, Fla., to Chattanooga,

**Baggage.** A carrier is liable for the loss of baggage.<sup>19</sup> "Baggage" means such articles of necessity and convenience as are usually carried by passengers for their personal use. It does not include merchandise held for sale, but if the carrier knowingly accepts such merchandise as baggage its liability is the same as in case of other baggage.<sup>20</sup>

Tenn. The car was wrecked in transit and the plant was repaired at a cost of \$1358.30, which the carrier refused to pay. Claimant was deprived of the use of the plant for 37 days, during which time his force remained idle and he sought to recover damage to the sum of \$1800 as overhead expenses. When the plant was delivered to the carrier at point of origin, its agent was notified that claimant had a contract at Chattanooga and that it was necessary to transport the plant with all the speed possible. HELD, that the overhead expense was the same as special damages and not recoverable, but that interest might be allowed as this was discretionary. *West Const. Co. v. Seaboard Air Line Ry Co.* (Tenn. 1919), 210 S. W. 633.

Irrespective of statute, it is a general rule that measure of damages where goods intrusted to a carrier are destroyed is their value with interest from date delivery should have been made. (State shipment). *Southern Pac. Co. v. Haug.* (Nev. 1919), 182 Pac. 92.

In an action against a railroad for conversion of cotton, in that the railroad delivered the cotton on a forged bill of lading, interest should be allowed the plaintiff only from judicial demand, and not from date of delivery of the cotton on the forged bill of lading; the conversion not being willful. *Hubbard Bros.*

& Co. v. Southern Pac. Co., 256 Fed. 761.

19. A limitation on the baggage check does not limit the carrier's liability unless assented to by the passenger and there is a contract fairly and honestly entered into establishing the limitation. *Ferris v. Minneapolis & St. L. Ry. Co.* (Minn. 1919), 173 N. W. 178. (State Case.)

The burden of proof is upon the carrier to prove that such a contract was fairly and honestly made. *Ferris v. Minneapolis & St. L. Ry. Co.* (Minn. 1919), 173 N. W. 178. (State Case.)

A "baggage check" is not ordinarily a "contract of carriage," but merely a receipt. *Ferris v. Minneapolis & St. L. Ry. Co.* (Minn. 1919), 173 N. W. 178, 179. (State Case.)

Proof of the contents of a trunk and their value at the time of delivery of trunk to hotel keeper without proof thereof at time of delivery by hotel keeper to initial carrier does not create presumption as to such contents and their value at time of delivery by initial carrier to final carrier, since such presumption would be based upon the presumption that trunk at time of delivery to initial carrier contained same articles as at time of delivery to hotel keeper. *Johnson v. Western Express Co.* (Wash. 1919), 181 Pac. 693.

20. *Ferris v. Minneapolis & St. L. Ry. Co.* (Minn. 1919), 173 N. W. 178.

## CHAPTER IX.

### ACTIONS AT LAW FOR DAMAGES.

**Jurisdiction of Courts.** From December 28th, 1917, to March 1st, 1920, most of the railroads of the United States were operated by the Government, and actions at law were governed by orders of the Director General of Railroads. Commencing with 12:01 a. m. March 1st, 1920, the roads were relinquished to private ownership, and hence are now subject to suit to the same extent as formerly.<sup>1</sup>

**Parties.** Some controversy arose while the roads were under private ownership as to whether property in their possession could be garnisheed. Claimant sent garments to one Shirk to do certain incidental work on them. In sending the garments back Shirk shipped them under an order bill of lading, and claimant replevined them from the carrier. Held that general order No. 43 of the Director General prohibiting garnishment or like process against property in the hands of federal operated carriers could not bar such action.<sup>2</sup>

1. Under Act Cong. Aug. 29, 1916 (U. S. Comp. St. § 1974a), and Act Cong. March 21, 1918 (U. S. Comp. St. 1918, §§ 3115¼a-c, e, f, j), Proclamations of the President Dec. 26, 1917, and April 11, 1918 (U. S. Comp. St. 1918, pp. 274, 275), and General Orders of the Director General of Railroads, held, that a railroad was operating under federal control as an agency of the government, and as such was the bailee of the property alleged to have been stolen, so that there was no variance though the property was alleged to be that of the company. *Vaughn v. State* (Miss. 1919), 81 So. 417.

2. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475, 478.

Congress cannot deprive citizens of the right to resort to the courts,

which may have been established by the several states to prosecute and defend actions or suits according to the established usage and practice, in accordance with the law of the land. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475, 476.

It would violate the provisions of Const. U. S. Amend. 14, \*1, prohibiting deprivation of property without due process of law, to hold that the lawful owner of goods which were in transit in the hands of a carrier under federal control could not take the goods, which were not for government use, because at that time they happened to be under federal control. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475, 476.

The Federal Bill of Lading Act Aug. 29, 1916, § 23, and Personal . .

**Burden of Proof.** In an action against a carrier for goods lost, where the carrier proves that loss occurred by act of God, burden shifts to claimant to prove that, notwithstanding such act of God, negligence of the carrier was proximate cause of loss.<sup>3</sup> When claimant proves delivery of goods to a common carrier, and failure of the carrier to deliver goods at point of destination, he makes a prima facie case, and the burden is upon the carrier to prove that loss was occasioned by act of God or of the public enemy, or by reason of inherent defect, or on account of fault of consignee.<sup>4</sup>

Property Law N. Y. § 210, declaring that goods shipped on an order bill of lading cannot, while in possession of the carrier, be attached by garnishment or otherwise, or be levied on under an execution, do not prohibit the true owner of goods which a bailee has wrongfully sent under an order bill of lading from replevying the same; the case not being within the purview of the statutes. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475, 476.

3. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1919), 209 S. W. 775.

4. *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1919), 209 S. W. 775.

Where claimant shipped a carload of rice receipted as being in apparent good order and upon arrival at destination only part of the rice was damaged, but testimony was to the effect that this would damage and injure the whole car, a verdict for the claimant can be upheld. *Texas & N. O. R. Co. v. Pipkin* (Tex. 1919), 209 S. W. 757.

"When a plaintiff proves delivery of goods to a common carrier, and the failure of the carrier to deliver

the goods at the point of destination, he makes a prima facie case, and the burden of proof is upon the defendant to prove, if it can, that the loss occurred by reason of one of the foregoing exceptions." *Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1919), 209 S. W. 775, 776.

Evidence that it took railroad more than 40 hours to transport shipment 221 miles, and that there were two delays of 8 hours each, held sufficient, in the absence of explanation on part of railroad justifying delays, to warrant finding that delay was unreasonable. *Baker v. Brown* (Tex. 1918), 210 S. W. 312.

Shipper suing carrier for damage to cattle in transit is required merely to establish by a preponderance of the evidence an injury to the cattle and amount thereof, and is not required to prove that damage was caused by negligent delay in transportation. *Missouri Pac. R. Co. v. Martindale* (Ark. 1919), 213 S. W. 777.

In action against express company for conversion of trunk, where express company admitted the receipt of the trunk consigned to plaintiffs, court properly rendered judgment

of nonsuit upon plaintiffs' failure to prove contents of trunk and value thereof, instead of giving plaintiffs judgment for value of the trunk itself, where there was no evidence as to value of trunk. *Johnson v. Western Express Co.* (Wash. 1919), 181 Pac. 693.

A notice of motion for judgment by shipper against a railroad company, alleging plaintiff delivered a quantity of potatoes for transportation to shipper from Concord, Va., to Pitcairn, Pa., that defendant negligently failed to transport with reasonable dispatch, and that by reason thereof plaintiff sustained damages, held to state sufficiently a cause for recovery, and it is immaterial whether the notice stated the correct measure of damages or not, since the extent of recovery was to be fixed by evidence. *Chandler v. Baltimore, C. & A. Ry. Co.* (Va. 1919), 99 S. E. 794.

Where a bailee, employed to make up material into shirts, improperly returned the material to plaintiff, the bailor, under an order bill of lading with draft attached, held, that General Order No. 43 of the Director General of Railroads, declaring that no property under federal control or derived from the operation of the carriers shall be subject to garnishment or like process, did not, in view of Act Cong. March 21, 1918 (U. S. Comp. St. 1918), §§ 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ p), regulating the operation of railroads, prevent the owner from replevying goods; the order not being applicable to goods of private persons merely in transit. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475.

To exempt from seizure or levy by judicial process, without surrender of the bill of lading to the carrier or its

being impounded by the court, goods shipped, for which an order bill of lading has been issued by the carrier, must, under Bill of Lading Act. Aug. 29, 1916, § 23 (U. S. Comp. St. § 8604l), and Personal Property Law N. Y. § 210, have been delivered to the carrier by the owner, or by a person whose act in conveying title to the goods to a purchaser for value in good faith would bind the owner. *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475.

Defendant's demurrer to plaintiff's evidence admits the facts which such evidence tends to establish. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

In proceedings by shipper by notice of motion for judgment against a railroad company for damages, where the notice does not show whether any bill of lading was ever issued or not, although the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) required one, but it appears that consignor was also consignee, and presumably never parted with his title to goods, the statement that they had been sold, taken in conjunction with other allegations of the notice, was no evidence that plaintiff had parted with his title, even if that could affect his right to maintain the action for damages for failure to transport with reasonable dispatch. *Chandler v. Baltimore, C. & A. Ry. Co.* (Va. 1919), 99 S. E. 794.

"The appellant relies upon General Order No. 43 of the Director General of Railroads, as interpreted by a judge of the District Court of the United States in the case of *United States v. Kambeitz*, 256 Fed.

**Competency of Witnesses.** In action by shipper against a carrier for injuries to horses and expense for extra feed, testimony of shipper that he would not have been at any expense for feed because he would have sold them to a certain person had they been uninjured was shipper's opinion merely, and therefore without probative force.<sup>5</sup> In an action for loss and damage it is proper to permit a witness who has dealt in peaches for thirty years to testify as to the condition of an entire lot of peaches, although he had only examined four or five baskets out of such lot.<sup>6</sup> Where witness for plaintiff had testified that he had inspected about 15 barrels at time of delivery to consignee, but had handled every barrel when apples were sold and was able to testify whether apples had become heated, held, that question as to condition of apples was for the jury, and that court erred in limiting recovery against defendant railroad to 37 barrels on the ground that the testimony showed that only that many barrels were inspected.<sup>7</sup> Where plaintiff examined 4 or 5 baskets in each lot of peaches, and testified that he could, from such inspection, testify as to quality and condition of

247, 250, as prohibiting this replevin. It reads as follows:

"It is therefore ordered that no moneys or other property under federal control or derived from the operation of carriers while under federal control shall be subject to garnishment or like process in the hands of such carriers or any of them, or in the hands of any employee or officer of the United States Railroad Administration."

"This was held, in the case last above cited, to apply to goods of private citizens while in course of transportation. In my opinion, such construction does violence to the intent and meaning of the order, and furthermore that, if it was intended to be so applied, it would be void, being beyond the powers of the federal administrator as conferred by the act of Congress. Act March 21,

1918, c. 25, 40 Stat. 451 (U. S. Comp. St. 1918, §§ 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ p.)" *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475, 478.

The procedure by motion for judgment under Code 1904, § 3211, as amended Acts 1916, c. 443, is intended to give plaintiff a simpler, cheaper, and more expeditious mode of procedure than is provided by a regular common-law action and greater laxity has been allowed in the pleadings. *Chandler v. Baltimore, C. & A. Ry. Co.* (Va. 1919), 99 S. E. 794.

5. *Lancaster v. Whittle* (Tex. 1919), 210 S. W. 334.

6. *Perkett v. Manistee & N. E. R. Co.* (Mich. 1919), 173 N. W. 359, 360.

7. *Perkett v. Manistee & N. E. R. Co.* (Mich. 1919), 173 N. W. 359.

entire lot, held, that question as to condition of peaches at time of inspection before shipment was for the jury, and that it was error to limit recovery against defendant railroad to 80 baskets because plaintiff had opened only 80 or 85 baskets.<sup>8</sup>

**Admissibility of Evidence.** The same rule governs the admissibility of evidence in loss and damage cases as arise in other common law actions.<sup>9</sup>

8. *Perkett v. Manistee & N. E. R. Co.* (Mich. 1919), 173 N. W. 359.

9. Objection that evidence is incompetent is sufficient where evidence could not have been made competent. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

Where evidence is immaterial, an objection to it as immaterial is sufficiently specific. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

The objection that evidence is incompetent is sufficient where the evidence is incompetent for any purpose. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

In implement dealer's action for destruction of goods by fire it will be presumed, upon question of damages, that if goods had not been destroyed dealer would have been required to make expenditure for insurance thereon. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

Where a party brings an action for loss and damage for shipment on account of delay, he has a right to introduce as evidence part of a letter written after his claim was presented to him by an agent of the carrier, in which the claim agent stated what was the usual schedule for trans-

portation between points in question and the court may properly exclude other portions of the letter as self serving, as in such a case it is not necessary that the entire letter be received. *Southern Pac. Co. v. Stephany*, 255 Fed. 681.

Jurors will be presumed to have knowledge of the length of time consumed in travel between two designated places; such facts being facts of general knowledge. *Baker v. Brown*, 210 S. W. 312.

A court is authorized to take judicial cognizance of the length of time consumed in travel by the present modes of conveyance between two designated places; such facts being facts of general knowledge. *Baker v. Brown*, 210 S. W. 312.

In action for damage to shipment of cattle, evidence as to the condition of the cattle at the time of their sale, ten days or two weeks after arrival at destination, was admissible as tending to show the actual and real condition of the cattle and the true extent of the damages sustained. *Ft. Worth & D. C. Ry. Co. v. Hill* (Tex. 1919), 213 S. W. 952.

In implement dealer's action for damage to stock of goods from fire, court will take judicial notice, on question of damages, that some of the goods, if not destroyed, would not have been sold during following season. *International Harvester Co.*

**Instructions and Verdict.<sup>10</sup>**

**Appeal.** Generally speaking new questions cannot be urged for the first time in a court of appeal.<sup>11</sup>

v. Chicago, M. & St. P. Ry. Co. (Ia. 1919), 172 N. W. 471, 472.

Objection that testimony is incompetent and immaterial is sufficient where the grounds of objection are discernible. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 472.

The district court was not required to take judicial notice of an order contained in a reported ruling of the Interstate Commerce Commission. *Fay v. Chicago, R. I. & P. Ry. Co.* (Ia. 1919), 173 N. W. 69.

If the grounds of objections are perfectly obvious, and the evidence is wholly admissible for any purpose, the general objection of incompetent, immaterial, and irrelevant is sufficient. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471.

In farm implement dealer's action against a railroad for destruction of goods upon the burning of a warehouse, railroad's objection to evidence held to raise the question of whether the measure of damages was the cost of replacement or the market value of the goods as evidenced by the implement dealer's price list. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471.

Statement of court, in passing upon the sufficiency of the objection of "incompetent, irrelevant and immaterial and no foundation laid," that trial court is not presumed to know the law, and that counsel cannot urge objections on appeal not urged in the lower court, is largely, if not wholly,

obiter. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471.

10. In a shipper's action for destruction of a steam shovel outfit, if an instruction assumed that such outfit was in defective condition and the defects were concealed, where these facts were established by the uncontroverted evidence, the instruction could not have been prejudicial to plaintiff. *Burke Const. Co. v. St. Louis & S. F. Ry. Co.* (Ark. 1919), 214 S. W. 13.

Refusal to give requested charge, covered by general charge given by the court, is not error. *Standard Boiler & Plate Iron Co. v. Brock*, (S. Car. 1919), 99 S. E. 769.

In a shipper's action against a railroad company for destruction of a steam shovel outfit, an instruction that the carrier was not liable for damages resulting from defective condition of the outfit and was under no duty to search for concealed defects therein, in the absence of specific objection at the time, held not subject to the construction of assuming that the shovel was defective, where no other instructions left the issue for the jury as to concealed defects and their being the sole or proximate cause of derailment and damage. *Burke Const. Co. v. St. Louis & S. F. Ry. Co.* (Ark. 1919), 214 S. W. 13.

11. The question as to whether the amount recoverable by shipper for delay is limited by the bill of lading cannot be considered by the United

States Circuit Court of Appeals when it was not presented to the court below. *Southern Pac. Co. v. Stephany*, 255 Fed. 680.

Where the evidence for defendant tending to bring the case within an exception to a common-law rule of liability was in conflict with the evidence for the plaintiff tending to show a contrary state of fact, the evidence for defendant was waived by its demurrer to evidence, and can-

not be considered by the Supreme Court of Appeals. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

On demurrer to evidence, conflicting evidence cannot be considered by the Supreme Court of Appeals. *Chesapeake & O. Ry. Co. v. National Bank of Commerce of Norfolk* (Va. 1919), 95 S. E. 454.

# THE Loss and Damage Review

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By

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**THE  
LOSS AND DAMAGE  
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## CHAPTER I.

### CONTROL AND REGULATION OF CARRIERS.

**Federal Legislation.** The construction placed upon acts of Congress by the Supreme Court of the United States is controlling on the state courts.<sup>1</sup> Where an interstate shipment was made during the period of government operation and control, the government was bailee of the property during its transportation.<sup>2</sup>

**State Regulation.** To detect and prevent stealing of live stock, the legislature may enact a law for the inspection of hides as a condition of their shipment within or without the state by a common carrier.<sup>3</sup>

**Who Are Common Carriers.** Persons engaged as an express company in the business of transporting goods for any person hiring them for that purpose are in law "common carriers."<sup>4</sup>

**What Is an Interstate Shipment.** A shipment of live stock from a point in Texas to Kansas City was interstate until it reached a point in Texas from which it was forwarded to another point in Texas under another contract made by the shippers with another railroad, to which the initial carrier was not a party, after which the shipment was intrastate.<sup>5</sup>

1. *Klotz v. Western Union Telegraph* (Iowa 1920), 175 N. W. 825.

2. *Bloch v. United States*, 261 Fed. 321.

3. *State v. Hines* (Ore. 1920), 186 Pac. 420.

Laws 1919, p. 732, § 3, making it unlawful to transport hides by common carrier without inspection and suspending the operation of the law in Mutlunomah county so long as a state brand and live stock inspector appointed by the governor under the laws of 1915, p. 43, § 16, providing

for such appointment upon request of the Cattle and Horse Raisers' Association, is maintained therein, is unconstitutional as a delegation of legislative power to such association, in view of Const. art. 4, § 1, prohibiting delegation of legislative authority, and art. 1, § 21, prohibiting laws taking effect upon any authority except as provided by the constitution. *State v. Hines* (Ore. 1920), 186 Pac. 420.

4. *Wolf Thread Co. v. Rosenbusch*, 180 N. Y. S. 94.

5. *Quanah, A. & P. Ry. Co. v. Collier* (Tex. 1919), 215 S. W. 838.

## CHAPTER II.

### BEGINNING OF LIABILITY.

**Delivery to the Carrier.** The general rule is that it is the duty of every common carrier to receive for carriage and to carry goods of any person tendered to it for transportation, provided the goods are such as it holds itself out as willing to carry; and it is ordinarily the duty of the common carrier to furnish vehicles suitable in every respect for the safe transportation of the various kinds of property which are usually carried by it, and any failure to observe its duty in this regard will render it liable for loss or injury caused thereby.<sup>1</sup> But where articles of an extraordinary

1. *St. Louis & S. F. Ry. Co. v. State* (Okla. 1919), 184 Pac. 442.

In *St. Louis & S. F. Ry. Co. v. State* (Okla. 1919), 184 Pac. 442, the court said:

"The general rule is well settled that it is the duty of every common carrier to receive for carriage and to carry the goods of any person tendered to it for transportation, provided the goods are such as it holds itself out as willing to carry. 10 C. J. 65; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73; *Elliott on Railroads*, § 1465. Subject to some exceptions, it is also the duty of the common carrier to furnish cars suitable in every respect for the safe transportation of the various kinds of property which are usually carried by it. Special cars must be furnished in some instances for transportation of perishable products, refrigerator cars for vegetables and meats; and other cars particularly adapted for the goods transported, as stock cars for cattle, and any failure to observe its duty in this regard will render the carrier

liable for loss or injury caused by such failure. 10 C. J. 85; *Hutchinson on Carriers*, § 505; *Atl. Coast Ry. Co. v. Geraty*, 91 C. C. A. 602, 166 Fed. 10, 20 L. R. A. (N. S.) 310. This general rule, however, is not without exception and qualification. *Elliott on Railroads*, § 1474; *United States v. Pennsylvania Ry. Co.*, 242 U. S. 209, 37 Sup. Ct. 95, 61 L. Ed. 251; *C. R. I. & P. Ry. Co. v. Lawton Refin. Co.*, 253 Fed. 705, 165 C. C. A. 299. In the case of *United States v. Pa. Ry. Co.*, *supra*, tank cars were held to be an exception to the general rule. It was also held that the Interstate Commerce Commission was without authority or power to require the common carrier to furnish such cars, and that case was followed by the Circuit Court of Appeals in the case of *C. R. I. & P. Ry. Co. v. Lawton Refin. Co.*, *supra*, where it was said:

"Where articles of an extraordinary character are offered, a carrier is not bound to accept them or provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was

character are offered, a carrier is not bound to accept them, or provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was not required to furnish tank cars to carry oils of a refinery.<sup>2</sup> And delivery and acceptance are essential to impose upon a railway company the duties and obligations of a common carrier.<sup>3</sup>

not required to furnish tank cars to carry the oils of a refinery.'

"In *re Private Cars*, 50 Interst. Com. Com'n R. 652, the Interstate Commerce Commission found there are fifty-nine varieties of liquids regularly transported in tank cars, and that cars used for transportation of one kind of liquid ordinarily cannot be used for transportation of another of the varieties, many of these liquids requiring specially constructed cars, with special fittings. In that case, among other things, it was said:

"It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner producing two kinds of oil, gasoline and residuum, requires two kinds of cars. Another refiner producing all grades of oil, from the lighter oil down to coke, will require several kinds of cars.'

"Counsel rely upon the case of *Atl. Coast Ry. Co. v. Geraty*, *supra*, where the railroad company was held liable in damages for a failure to furnish refrigerator cars for transportation of vegetables; but the facts of that case easily distinguish it from the instant case. There the railroad company had induced plaintiff, and other vegetable growers in that region, to plant certain crops, expecting that, if they raised vegetables, refrigerator cars necessary for such vegetables

would be obtained, and under these facts it was held that the plaintiff was entitled to recover damages sustained by the carrier's refusal to furnish refrigerator cars on reasonable demand for transportation of plaintiff's cabbages. It was said:

"Where plaintiff, owning a farm in a truck region, was induced to plant a large quantity of cabbages by assurance of defendant railroad company that refrigerator cars would be furnished to transport the cabbages to market, which it refused to do on reasonable demand, plaintiff was entitled to recover for unharvested cabbage which spoiled because of defendant's refusal to furnish refrigerator cars. \* \* \*

"In the instant case, the action is not for damages, but one to compel the common carrier to furnish tank cars under an alleged duty resting upon the common carrier and not by virtue of any contract. Counsel also rely upon the case of *State v. C. W. B. Ry. Co.*, 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319, but the question involved there was a discrimination in the rates charged. No such question is presented in this case. The Corporation Commission was without authority to make the order."

2. *St. Louis & S. F. Ry. Co. v. State* (Okla. 1919), 184 Pac. 442.

3. *Atchison, T. & S. F. Ry. Co. v. Colorado Alfalfa Mill and Power Co.* (Colo. 1919), 184 Pac. 373.

**Nature and Functions of the Bill of Lading.** A bill of lading is a muniment of title quasi negotiable, and at common law transferable so as to pass title to the goods in transitu, when such is the intention of the parties, as effectually as if the goods themselves had been delivered.<sup>4</sup> The indorsement and delivery of a

4. *Frontier Nat. Bank of Eastport v. Salinger* (Ind. 1920), 126 N. E. 40.

Where consignor draws on consignee for the purchase money, and the draft with the bill of lading attached is indorsed or transferred to a bank which discounts the draft and places the proceeds to the credit of the consignor, a special property in the goods passes to the bank, subject to be divested by acceptance and payment of the draft, and superior to the rights of attaching creditors of the consignor. *Frontier Nat. Bank of Eastport v. Salinger* (Ind. 1920), 126 N. E. 40.

Where tomato pulp was sold on credit, title thereto passed to the purchaser on delivery of the pulp to the carrier for transportation. In *re Arctic Stores*, 258 Fed. 688.

In *re Arctic Stores*, 258 Fed. 688, 690: "The pulp so shipped was sold to the Arctic Stores on credit, and when it was delivered to the carrier for transportation to the purchaser the title passed to the latter. *Leonard v. Davis*, 66 U. S. (1 Black.), 476, 483, 17 L. Ed. 222; *National Bank v. Dayton*, 102 U. S. 59, 62, 26 L. Ed. 77; *McElwee v. Metropolitan Lumber Co.* (C. C. A. 6), 69 Fed. 302, 305-307, 16 C. C. A. 232; *Canadian Northern Ry. Co. v. Northern Miss. Ry. Co.* (C. C. A. 8), 209 Fed. 758, 760, 126 C. C. A. 482; *Benj. on Sales* (5th Ed.), 218, 837, 838. See, also, N. J. Uniform Sale of Goods Act, approved May 7, 1917 (N. J. P. L. 1907, p.

311); 4 N. J. Comp. Stat. 4645, § 19, rule 4(2), and section 46(1).

"While the right to stop delivery of goods sold on credit is predicated on the insolvency of the buyer, yet neither insolvency nor bankruptcy of the buyer works a rescission of the contract of sale, and an effective stoppage in transitu does not in itself annul the sale or divest the purchaser of the title to the goods, which passed on delivery to the carrier. *Shepard v. Newhall* (C. C. A. 9), 54 Fed. 306, 4 C. C. A. 352; *Benj. on Sales* (5th Ed.), pp. 808, 809, 816; N. J. Uniform Sale of Goods Act, *supra*, §§ 57, 61. It has been said that 'the right of stoppage in transitu is merely an extension of the lien for the price which the vendor has after contract of sale and before delivery of goods sold on credit.' *Johnson v. Evelynth*, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50. A more nearly accurate statement, seemingly, is that the insolvency of the buyer gives the vendor a right to reobtain possession of the goods from the carrier, while they are on their way to the vendee, and that upon giving notice not to deliver before the carriage is at an end he may retake and retain the goods as security for the price. See *Arnold v. Delano*, 4 Cush. (Mass.), 33, 50 Am. Dec. 754; N. J. Uniform Sale of Goods Act, *supra*, § 57.

"However, this right to retake only continues while the goods are in transit. When the goods reach their destination, the vendor's right to repos-

negotiable draft with bill of lading attached implies an intent to transfer the title to the goods, and strong evidence is required to show that the intention was other than these acts indicated.<sup>5</sup>

session is gone, his potential security is lost, and his status in relation to such goods is no different from that of a general creditor of the vendee.

"In the instant case, when the carrier placed the car containing the pulp on the siding designated in the bill of lading it had reached its destination, and the transit was at an end. The Eddy, 72 U. S. (5 Wall.), 481, 495, 18 L. Ed. 486; Conyers v. Ennis, 6 Fed. Cas. 377, No. 3149; In re M. Burke & Co. (D. C. W. D. Pa.), 140 Fed. 791, 15 Am. Bankr. Rep. 495; In re W. A. Paterson Co. (C. C. A. 8), 186 Fed. 629, 108 C. C. A. 493, 25 Am. Bankr. Rep. 855, L. R. A. (N. S.) 31; Shepard & Morse Lumber Co. v. Burroughs, 62 N. J. Law, 469, 41 Atl. 695; 2 Kent, Comm. pp. 706, 707; Johnson v. Evelyth, *supra*; Benj. on Sales (5th Ed.), pp. 906, 907; Scott v. Pettit, 3 B. & P. 469; Ellis v. Hunt, 3 T. R. (D. & E.) 464; Kendal v. Marshall Stevens & Co. (C. A.), 11 Q. B. D. L. R. (1882-83), 356; Sawyer v. Joslin, 20 Vt. 172, 49 Am. Dec. 768.

"When the carrier placed the car on the designated siding, its duty as a carrier was ended. If that were not a delivery, what would be one on such a shipment? Certainly, the carrier would have to unload the car. It would not be liable to the vendor for failing to stop delivery, for delivery had been made at the very place designated in the bill of lading. If the carrier's placing the car on a siding was a delivery, so as to exonerate it from liability to the vendor, it is none the less so when the vendor in-

vokes a remedy against the vendee necessarily solely predicated on the giving of a notice to stop delivery while the goods are yet in transit, i. e., before delivery is made."

A notation on a bill of lading for a car of grain, which rendered it non-negotiable, *held* not invalidated under the Act of Aug. 29, 1916, § 3 (Comp. St. § 8604b), by a subsequent re-billing of the car in interstate commerce without the knowledge of the legal owner of the grain. *Rainbolt v. Lamson Bros.*, 259 Fed. 546.

A bill of lading for a car of grain, stamped on its face "Receipt issued for this bill of lading under rules of Omaha Grain Exchange," *held* to charge a transferee, who was a member of the exchange, with notice that, as provided in such rules, title to the grain remained in the holder of the receipt until he was paid therefor. *Rainbolt v. Lamson Bros.*, 259 Fed. 546.

Title to goods delivered to a carrier remained in consignor, where there had been no sale to consignee. *Southern Express Co. v. Freeze* (Ark. 1919); 216 S. W. 303.

5. *Ranney-Davis Mercantile Co. v. Bumgarner* (Kansas 1919), 185 Pac. 287.

5. In a shipment of goods, the consignor, who was indebted to a bank, endorsed the bill of lading and drew a draft in favor of the bank, to be applied on his indebtedness to it. The bank forwarded the bill of lading and draft to its correspondent, and the consignee paid the draft and obtained possession of the goods, but

**Recitals in Bills of Lading.** Bills of lading and waybills may constitute admissions as to what articles were delivered to the carrier for shipment.<sup>6</sup>

**Agent of Carrier.** It was within the scope of the authority of a railroad's agent to issue a bill of lading binding it to take up a carload of corn from its connecting carrier and to continue the carriage from its destination under a bill of lading issued by the original carrier to a new destination.<sup>7</sup> But where a railroad's agent exceeded authority in issuing bill of lading purporting to bind the road to transport over connecting lines property it had not and never afterwards acquired possession of, but the road, by attempting to perform, adopted its agent's act, it was liable for damage resulting from negligent failure to transport and deliver within a reasonable time.<sup>8</sup>

**Destruction of Shipment on Private Siding.** A provision in a carrier's bill of lading that, when goods were received on private or other sidings, they shall be at the owner's risk until the car is attached to a train, is not rendered invalid by the Cummins Amendment.<sup>9</sup> Where a car of headings had been loaded and placed on a side track, but the bill of lading provided that delivery should not be complete until the car had been attached to a train, and the car was burned by a fire breaking out in a neighboring yard, evidence held to make it a jury question whether the carrier in refusing to move the car when requested was guilty of negligence and liable for the damages sustained.<sup>10</sup> And a pro-

immediately attached the proceeds of the same in the hands of the correspondent for a debt of the consignor: *Held*, that the transfer of the draft and bill of lading transferred the title of the goods to the bank, and the consignee took them subject to the rights of the bank, and the proceeds of the shipment were not subject to attachment for a debt due to the consignee from the consignor. *Ranney-Davis Mercantile Co. v. Bumgarner* (Kansas 1919), 185 Pac. 287.

6. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

7. *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Tex. 1919), 214 S. W. 833.

8. *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Tex. 1919), 214 S. W. 833.

9. *Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co.* (Ark. 1919), 215 S. W. 897.

10. In *Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co.* (Ark. 1919), 215 S. W. 897, the court said:

"The Chickasaw Cooperage Company brought suit against the Yazoo

& Mississippi Valley Railroad Company for the value of a car of heading which was burned on a side track in the yards of the company, connected with the railroad company's line of railway. In August, 1915, the Hudson & Dugger Company was operating a heading factory at Clarksdale, Miss., and it had in its yards a side track or spur which connected with the main line of the defendant's railroad. A car of heading was loaded about 11 o'clock in the daytime, and a bill of lading presented to the agent of the railroad company for his signature at 1:30 in the afternoon. The car had been placed there by the railroad to be loaded. The agent of the railroad company signed the bill of lading when it was presented to him, and the car was sealed up and ready to be transported by the railroad company. The car of heading was consigned to the plaintiff, Chickasaw Cooperage Company. About 11 o'clock that night, a kiln in the factory of Hudson & Dugger Company caught on fire and the flames extended to the car of heading and burned it up. The origin of the fire was unknown.

"According to the testimony of the plaintiff, the railroad company had a switch engine there which was in part used in transferring cars from the side track on the factory yards of Hudson & Dugger Company to the main line of the railroad company. This engine was in use on the night of the fire, and the employes of the Hudson & Dugger Company asked the engineer to pull the car of heading to a place of safety, and the engineer in charge of the switch engine refused to do so. There was plenty of time for the engine to have been attached to the car of heading and to

have drawn it to a place of safety before it caught on fire.

"On the other hand, according to the testimony of the railroad company, a piece of hose was stretched across the track, and it was forbidden by the fire company to run its engine across the hose. The hose was placed across the track for the purpose of trying to prevent the fire from spreading to a lot of lumber which was there, and much more valuable than the car of heading. The shipment was an interstate one, and the bill of lading on the back contained a clause as follows:

"'Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, and when received from or delivered on private or other sidings, wharves or landings, shall be owner's risk until the cars are attached to and after they are detached from trains.'"

"Hart, J. (after stating the facts as above). It is first earnestly insisted by counsel for the plaintiff that the provision in the bill of lading that, when goods are received on private or other sidings, they shall be at the owner's risk until the car is attached to a train, is of no effect under the Cummins Amendment to the Interstate Commerce Act, which was approved March 4, 1915 (Act Feb. 4, 1887, c. 104, § 20, as amended by Act March 4, 1915, c. 176, 38 Stat. 1196 [U. S. Comp. St. §§ 8592, 8604a]).

"We think counsel are mistaken in this contention. The only effect of the Cummins Act was to prevent common carriers from limiting their liability as to the amount to be recovered when goods are lost or destroyed in transportation, except in certain in-

stances where goods are hidden from view; and the amendment also makes it unlawful for any such common carrier to provide by contract for a shorter period of time for giving notice of claims than 90 days, and for the filing of claims for a shorter period than 4 months, and for the institution of suits than two years. This is shown by the express language of the amendment, and we do not deem it necessary to set out the language of the Cummins Amendment, for the language relied upon by counsel for the plaintiff to sustain their present contention is contained in the Interstate Commerce Act as it existed before the Cummins Amendment was adopted. The clause of the bill of lading relied upon by the railroad company to exempt it from liability in the case at bar is that property, when received on a private siding for shipment, shall be at the owner's risk until the car or cars containing it are attached to a train. This contract does not undertake to limit the railroad company's liability as a common carrier; it merely defines the circumstances under which delivery for shipment and acceptance by the railroad company shall be understood as having taken place between the parties. The liability of the railroad company, under the Interstate Commerce Act, attaches as soon as the goods are delivered to the carrier for immediate shipment and are accepted by it. By the clause in question the parties undertook to agree when the delivery and acceptance were complete, and the meaning and intent of the clause in question was that the delivery for shipment and acceptance should be complete when the car was removed from the siding and attached to a train.

"This was a valid agreement under the principles of law decided in *St. Louis, I. M. & S. R. Co. v. Jones*, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. Rep. 99. In that case the court held that under the Interstate Commerce Act carriers may stipulate with shippers of live stock that the latter shall assume all risks and expense of caring for the live stock until loaded in the cars. In that case the cattle had been placed in a pen of the railroad company at its station, for immediate shipment, and a bill of lading had been executed by the railroad company. There was a clause in the contract which provided that the shipper should assume all care and risk of the cattle while in the pen, and that the railroad should not become liable for them until they were loaded on its train. The court held that the contract was a valid one. The contract of shipment did not provide that the cattle were to be transported within any specified time, but the court held that it was the duty of the railroad to transport the cattle with all convenient dispatch, with such suitable and sufficient means as it was required to provide in its business; that is to say, in a reasonable time.

"We think the principle there announced controls here. It is true that under the facts of the case at bar the car had been loaded and sealed up. The railroad company had been notified of that fact and had issued its bill of lading for the car of heading. The object of the agreement, however, was to give the railroad company a reasonable time after this to come and take charge of the property before it will be deemed to have accepted it for transportation and its liability as a common carrier commenced. This brings the case

vision in a bill of lading, that the carrier shall not be liable for property left on certain kinds of sidings until the cars are attached to trains, may be altered by custom and usage.<sup>11</sup> In an action against a carrier to recover for the loss of property left on siding, the burden was upon the claimant to show that a stipulation in the bill of lading, to the effect that the carrier should not be liable for property on such a siding, had been altered by custom and usage, and the extent of the modification.<sup>12</sup> In an action against a carrier for loss of property by fire while standing on a siding, the mere placing of the car upon the siding was not delivery to or acceptance by the carrier of such car, although the carrier had given the shipper blank bills of lading to be filled out, which bills of lading were signed by the freight conductor when notified, or when he saw that loaded cars were standing on the siding.<sup>13</sup>

within the principles announced in *St. L. I. M. & S. R. Co. v. Jones*, supra. To the same effect, see *Bainbridge Grocery Co. v. Atlantic Coast Line R. Co.*, 8 Ga. App. 677, 70 S. E. 154; *Standard Combed Thread Co. v. Pennsylvania R. Co.*, 88 N. J. Law, 257, 75 Atl. 1002, L. R. A. 1916C, 608; *Siebert v. Erie R. R.*, 163 N. Y. Supp. 111; and *Bers v. Erie R. Co.*, 176 App. Div. 241, 163 N. Y. Supp. 114.

"It is next contended by counsel for the plaintiff that the railroad company was guilty of negligence in refusing to remove the car to a place of safety during the fire, and that on this account the judgment should be reversed. In this contention we think counsel are correct. The testimony for the plaintiff shows that the car had been loaded and sealed up, that it was on a siding connected with the railroad company's main track, that it had notified the railroad company that the car was ready for movement, and that it had issued a bill of lading therefor. The car was there waiting a reasonable time for the railroad company to place it in a

train. Under these circumstances, the car was under the control of the railroad company, and it was not a volunteer when it was requested to remove the car to a place of safety during the fire and refused to do so. It had a switch engine at the scene of the fire with steam up manned by a crew.

"According to the testimony of the plaintiff, the railroad company had ample time to have removed the car to a place of safety after the crew was requested to do so and before the hose was stretched across the track. This testimony, if true, under the circumstances, constituted negligence on the part of the railroad company, and the court erred in not submitting that question to the jury."

11. *Atchison, T. & S. F. Ry. Co. v. Colorado Alfalfa Mill & Power Co.* (Colo. 1919), 184 Pac. 373.

12. *Atchison, T. & S. F. Ry. Co. v. Colorado Alfalfa Mill & Power Co.* (Colo. 1919), 184 Pac. 373.

13. *Atchison, T. & S. F. Ry. Co. v. Colorado Alfalfa Mill & Power Co.* (Colo. 1919), 184 Pac. 373.

Where a railroad, pursuant to notation on bill of lading, placed car containing bags of ore on one of its sidings, while car was en route, for purpose of enabling shipper's agent to sample ore, and where, after ore had been unloaded, sampled, and reloaded into car, and after railroad's agent had counted bags, given receipt therefor, and sealed car, the car was broken into and the ore stolen before car was attached to a train for resumption of transportation, the car and ore at time of theft was in possession of railroad as a common carrier, and railroad was liable for loss of ore.<sup>14</sup> Where a bill of lading provided that, when goods were received on private or other sidings, they should be at the owner's risk until car was attached to a train and the car had been loaded and sealed up and the carrier notified thereof, the carrier had a reasonable time thereafter to take charge of property before becoming liable for damages thereto by fire breaking out prior to its removal.<sup>15</sup> A bill of lading providing that, when goods are received on private or other sidings, they shall be at the owner's risk until the car is attached to a train, does not limit the carrier's liability as a common carrier, but merely defines the time of delivery to the carrier and is valid.<sup>16</sup>

**Failure of Carrier to Furnish Facilities.** It is the duty of a carrier to furnish proper facilities for the prompt and safe carriage of such shipments as are entrusted to it. So a railroad company is under duty to exercise ordinary care to provide suitable pens for loading and unloading live stock; and where horses to be shipped were overheated in a "cutting out" process made necessary by the railroad's negligence in permitting water troughs to overflow, rendering the pen muddy, such road was liable for consequent injuries to the horses in transit.<sup>17</sup> If part of the injury to a shipment of horses arose solely from the shipment being in a box car, and part solely from the condition of the shipping pens,

14. *Siebert v. Erie R. Co.*, 179 N. Y. S. 136.

15. *Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co.* (Ark. 1919), 215 S. W. 897.

16. *Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co.* (Ark. 1919), 215 S. W. 897.

17. *Gulf, C. & S. F. Ry. Co. v. Culwell* (Tex. 1919), 216 S. W. 457.

In *Gulf, C. & S. F. Ry. Co. v. Culwell* (Tex. 1919), 216 S. W. 457, the court said, p. 458:

"The appellee, being desirous of shipping some horses from San Angelo to Brownwood applied to appel-

lant's agent at San Angelo for cars in which to ship the same. On account of pressure of business created by war conditions, appellant was unable to furnish appellee a stock car, and so informed appellee. Appellee entered into an oral agreement with the agent of appellenat that, if he would furnish box cars in which to ship his horses, he would assume all risk of damage from the use of such cars; and, when the horses were loaded, and before the shipment started, appellee signed the following written statement, indorsed on the contract of shipment:

"Shipper assumes all risk of damage likely to occur caused by loading in box car."

"Upon arrival at Brownwood, some of the horses were found to be dead, occasioned by suffocation and overheating. The jury found the damage as thus occasioned to be \$500, and the evidence supports such finding. The horses were very hot when loaded into the car. Had they not been overheated, they would not have been injured on account of lack of ventilation of the box car in which they were shipped, as is shown by the fact that other horses, not overheated, shipped in the same train in the same kind of cars, with the same kind of ventilation, were not injured.

"The cars were ventilated on the south side by strips being nailed across the door, but the north door was practically closed. Had the north door been left open, and strips nailed across same, the horses would not have been injured, notwithstanding the fact that they were overheated when they were loaded.

"The overheating of appellee's horses before shipment was occasioned by cutting or separating the

colts from the mares in muddy pens, by reason of which the cutting could not be done in the usual way, that is, on foot, but had to be done on horseback. Had the pens not been muddy, the mares and colts could have been separated without overheating them, and no damage would have occurred by reason of using a box car for their shipment.

"In shipping mares and colts, it is customary to separate them in the shipping pens, and ship them in separate cars, as was done with appellee's mares and colts. This is necessary to protect the colts from being injured by being trampled upon by the grown stock.

#### Opinion.

"Appellee alleged negligence upon two grounds: One in failing to properly ventilate the car in which the injured horses were shipped; and the other in not furnishing suitable pens for loading said horses.

"We do not think that the first ground is sustained by the evidence. The south door of the car was ventilated by nailing strips across it from inside before the horses were put in the car. The horses were loaded through the north door. It is shown by the testimony that strips could not have been nailed across this door from the inside after the horses were loaded, as the car was full of untamed horses. If strips had been nailed across from the outside, the weight of the horses would have pushed them off, and the horses would have fallen out. Appellee testified that an open barred gate could have been made and fastened in the north door cleats, and thus have ventilated the car so that no injury would have occurred. Granting this to be true, the appellant did not ex-

the risk from the use of a box car being assumed by the shipper, while the improper condition of the pens was negligence of the railroad for which it was liable, the damage from each cause should be apportioned, and the shipper given recovery only for the part caused by the condition of the pens.<sup>18</sup> A railroad's con-

pressly contract to thus ventilate the car, nor do we think it did so impliedly. Four or five other box cars were loaded in the same manner, and shipped in the same train. Appellee was present and saw how they were loaded, and made no objection to his horses being loaded and shipped in this way. He left the pen after his horses were in the car, but before the north door was closed. He had seen that the north door of the other cars had been closed, and had no reason to presume that the same would not be done as to the car which contained his horses. We think that, when he assumed 'all risk of damage likely to occur caused by loading in a box car,' he assumed the risk arising from the car being in the condition that it was as to ventilation.

"But, notwithstanding the lack of ventilation, appellee's horses would not have been injured but for their overheated condition when they were placed in the car, and they would not have been overheated but for the muddy condition of the pens. This condition was caused by appellant negligently permitting the water troughs to overflow, by reason of the hydrant being left open.

"This case was submitted on special issues, the first of which was as follows:

"Did plaintiff's horses sustain any damage as a direct result of any failure on the part of defendant, its agents, or employees, to exercise ordinary care to provide suitable pens for

the separating and loading of said horses? Answer yes or no.' To which the jury answered, 'Yes.'

"It is the duty of railway companies to exercise ordinary care to provide suitable pens for loading and unloading stock. *Railway Co. v. McRae*, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926; *Railway Co. v. Mitchel*, 85 S. W. 286; *Railway Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; *Railway Co. v. Crenshaw*, 59 Tex. Civ. App. 238, 126 S. W. 602.

"For the reason that appellant negligently failed to provide suitable pens for loading appellee's horses, as the result of which they were injured in the amount adjudged in the court below, the judgment of the trial court herein is affirmed.

"Affirmed."

That the shipper of live stock bottoms his cause for damages on breach of the carrier's common-law duty to furnish cars on reasonable notice does not prevent the consequences of an agreement, supported by valuable consideration, whereby such damages are waived. *Coleman v. Hines* (Mo. 1920), 217 S. W. 602.

17. *Gulf, C. & S. F. Ry. Co. v. Culwell* (Tex. 1919), 216 S. W. 457.

18. *Gulf, C. & S. F. Ry. Co. v. Culwell* (Tex. 1919), 216 S. W. 457.

In *Saitta & Jones v. Penn. R. R.* 179 N. Y. S. 471, the court said:

"On or about December 15, 1916, the defendant entered into an agreement with the plaintiffs, for a good and

tract with shipper as to furnishing of cars for interstate shipment, where not provided for by any tariff filed by the railroad, was void, under the Interstate Commerce Act, and cannot be made the basis of a claim for damages.<sup>18½</sup>

**Place and Manner of Furnishing Cars.** Where it was a custom for a common carrier to furnish cars to a shipper at a cer-

sufficient consideration, that it would furnish at Pier B, Jersey City, not later than Saturday morning, December 16, 1916, six freight cars for plaintiff's use in shipping grapes over defendant's railroad to Iowa and other states. For the breach of this contract the plaintiffs have had a verdict for their damages. At the close of the evidence the defendant moved to dismiss the complaint, and for judgment against the plaintiffs, upon the ground that the contract above stated was illegal and void; it being prohibited by the Interstate Commerce Act. The motion was temporarily denied, with a view of taking the verdict and passing upon the question upon a motion to set the same aside. The opportunity afforded for a more careful examination of the question than was presented at the trial leads to the conclusion that the motion to dismiss the complaint and for judgment in defendant's favor ought to have been granted.

The plain reading of sections 1 (b), 3, 6(a) and 6(g) of the Interstate Commerce Act, 4 Fed. Stat. Ann. 351-421 (U. S. Comp. St. §§ 8563, 8565, 8569), prohibits a common carrier from making any special contract relative to its cars as facilities of interstate shipment that is not specified in tariffs filed with the commission. The defendant had not filed any tariff with the commission that provided for the contract made here-

in. The following authorities condemn the contract under consideration, and it cannot be the basis of a claim for damages: *Chicago & Alton v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Am. Smelting Co. v. Union Pac. (C. C. A.)* 256 Fed. 737; *Georgia, Fla. & Ala. Ry. Co. v. Blish*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; *J. H. Hamline v. Ill. Cent. Ry. (D. C.)* 212 Fed. 324; *C., R. I. & Pac. Ry. v. Hardwick*, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; *South. Ry. Co. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; *Morrisdale Coal Co. v. Penna. Ry. Co.*, 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494; *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836."

"There being no delay in furnishing cars under the contract under which the shipment was made, the language thereof that the shipper waives and releases all claims arising from or connected with the shipment or the arrangements therefor, existing at or before execution of the contract, including 'any delay in the furnishing of cars,' relates to prior delay in furnishing them on notice. *Coleman v. Hines (Mo. 1920)*, 217 S. W. 602.

18½. *Saitta & Jones v. Pennsylvania R. Co.*, 179 N. Y. S. 471.

tain point where cotton was loaded for shipment, after which same was inspected by an employe of the Western Weighing and Inspection Bureau, whose duty it was to make out and deliver to the carrier a certificate of inspection, and the cars were sealed by said inspector, and where after the cotton was inspected the shipper had nothing further to do in order to start the cotton in transit, held, that when cars were delivered by the carrier and loaded by the shipper and inspected and sealed by the inspector the liability of the shipper as a common carrier attached, and where the cotton was thereafter destroyed by fire the carrier is liable for the value thereof.<sup>19</sup>

19. St. Louis & S. F. R. Co. v. Blocker (Okla. 1919), 184 Pac. 584.

In St. Louis & S. F. Ry. Co. v. Blocker (Okla. 1919), 184 Pac. 584, the court said:

"E. E. Blocker and N. F. Miller, as partners under the firm name of Blocker-Miller Company, commenced this action against the St. Louis & San Francisco Railway Company, a corporation, and James W. Lusk, W. C. Nixon, and W. B. Biddle, as receivers of said corporation, to recover the value of 100 bales of cotton destroyed by fire on defendant's premises in the city of Hugo, during the night of December 17, 1914. The liability sought to be enforced against defendants is that of a common carrier. The cotton was loaded by the Trans-Continental Compress Company, at Hugo, in two cars of defendants which were placed beside the plant of the Compress Company on a spur track belonging to defendants a day or two prior to December 17th. It was a requirement of defendants and a custom always confirmed to in the dealing between plaintiffs and defendants that cotton should be inspected by an inspector of the Western Weighing and Inspection Bureau, and a certificate of in-

spection issued by him before the cotton would be shipped. The local agent at Hugo had instructions from the general offices of defendants at St. Louis to ship no cotton unless inspection was made and certificate issued. Plaintiffs nor the Compress Company had any connection with, or authority over, the inspector who performed these duties.

"On the 16th day of December, the cotton was inspected and some of it found to be wet. On the morning of the 17th, a portion of it was unloaded and permitted to dry and was reloaded on the afternoon of the same day, when an inspector inspected the cotton sealed, or caused the cars to be sealed and prepared an inspection certificate, the original of which was delivered to the defendants on the following morning, and a copy to the Compress Company. The certificate is as follows:

"Western Weighing and Inspection Bureau.

"Cotton Inspection Certificate.

"Hugo, Okla., Dec. 17, 1914.

"This is to certify that we have inspected the following described cotton at Trans Contl No. of bales 50 for account of Frisco Shipper Block-

er *Miller Co. Seals K. C. 222 K. C. 225. Condition of car O. K.*

"That night about 10 p. m. the cotton caught fire and burned.

"Defendants demurred to plaintiffs' evidence and moved for an instructed verdict, both of which were overruled, and error is assigned thereon. The cause was submitted to the jury upon the theory that, if the inspector or his principal was in the employment of defendants, plaintiffs were entitled to recover, and error is urged thereon for the reason that there were neither allegations nor proof that said inspector or his employer was in the service of defendants. The liability of defendants as common carriers depends upon the question whether the cotton had been delivered to and accepted by them for shipment at the time the fire occurred. The true test for determining whether the liability of a common carrier has attached is not the execution and delivery of a bill of lading (*Elliott on Railroads*, § 1415, 4 R. C. L. 695, § 174); but, when the goods are placed in a condition ready for shipment at a point where the carrier has directed said goods to be placed, and the carrier has been notified of the delivery and furnished with shipping directions (*K. C., M. & O. Ry. Co. v. Cox*, 25 Okl. 774, 108 Pac. 380, 32 L. R. A. [N. S.] 313), or where the goods have been delivered to the carrier according to the custom and course of dealing between the shipper and the carrier, with shipping directions furnished, and nothing remains to be done by the shipper to place the goods in course of transit, this liability commences (4 *Elliott, Railroads*, § 1404; *Hutchinson on Carriers* [3d Ed.] § 124; R. C. L. 688, § 167). In the absence of a

special contract or custom, it is not sufficient to place the property at a point on the carrier's premises from which it might readily be taken by the carrier, but there must be notice to the carrier of the delivery and intention to place the goods in the custody of the carrier for transit. 10 C. J. 222. But it is generally held that this rule is subject to any conventional arrangement between the carrier and its patrons, or to the custom or usage in their dealings which dispenses with giving of actual notice to the carrier of the delivery of the goods. In other words, when by special contract, custom, or usage goods are placed by the shipper at a point at which they are accustomed to be deposited, this will be sufficient delivery and acceptance to charge the carrier as an insurer, although no actual notice is given or assent shown. 10 C. J. 223; 4 R. C. L. 691, §§ 169, 170, 172.

"It is shown that the custom of dealing between plaintiffs and defendants was that cars were placed upon the track alongside the plant of the compress company; that bills of lading were prepared by plaintiffs and delivered to defendants for execution, and cotton loaded by the compress company, after which inspection thereof was made by a representative of the Western Weighing and Inspection Bureau, whose duty it was to furnish to defendants an inspection certificate, and that when cotton was loaded and inspected, plaintiffs nor the compress company were required to do anything else in order to start the cotton in transit. These facts were sufficient to establish the relation of shipper and carrier, and impose upon defendants the liability of a common carrier from and after the

**Transportation over Designated Route.** Where the proximate cause of injury to a carload of corn was the failure of one of the railroads which carried it to comply promptly with the request of the original consignee of the car to carry it to another point than it was originally billed to, which resulted in a delay of about one month, the railroad was liable as for a breach of its undertaking to transport to a new destination and make delivery within reasonable time, as evidenced by the bill of lading issued to the original consignee by its agent.<sup>20</sup>

time the cotton had been inspected and the cars sealed by the inspector.

"It is not error to submit to the jury the question as to whether the inspector or his employer was agent of and acting for defendants. The general office of defendants in St. Louis had instructed the local agent at Hugo to ship no cotton until inspection was made and certificate issued, and it is shown to be the custom as between plaintiffs and defendants for the inspector to inspect the cotton and seal the cars and deliver inspection certificate to the local agent who thereupon signed bills of lading which had been previously prepared by plaintiffs containing specific shipping instructions. The certificate of inspection in this case shows on its face that it was made 'for account of Frisco,' and these circumstances were sufficient to warrant the jury in finding that the inspector or his employer was in the service of defendants, and that when the cotton was inspected and the cars were sealed defendants had notice that the cotton was ready for shipment. Whether the inspector delivered the certificate on the evening of the 17th or waited until the morning of the 18th would make no difference, for it was his duty to deliver this certificate to defendants, and neither plaintiffs nor

the compress company had anything further to do in order to start the cotton in transit. The petition alleged that the cotton was delivered to defendants, and that they received and accepted the same. No motion was filed to require plaintiffs to set out the name of the agent with whom plaintiffs dealt. Had defendants desired, they might have required that this information be furnished, and, not having done so, plaintiffs were entitled to prove under the general allegation of delivery in the petition, that the cotton had been delivered to defendants in any lawful manner. A corporation must of necessity act through agents and under the state of the pleadings it was competent to prove delivery and notice to defendants as was done.

"The judgment is affirmed."

20. *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Tex. 1919), 214 S. W. 833.

A carrier which never undertook to transport a carload of corn further than S., by changing the routing of the corn, without notation on the bill of lading, did not become an insurer of its arrival in good condition at P. *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Tex. 1919), 214 S. W. 833.

## CHAPTER III.

### NEGLIGENCE DURING TRANSPORTATION.

**Delay.** A carrier's liability at common law for unreasonable delay in transportation is the difference between the market value of the freight at the time and place it was delivered and such value when and where it should have been delivered.<sup>1</sup> A railroad is liable for death of horses, caused by its negligent delay in transportation.<sup>2</sup> In action against carrier for delay and damage to shipment of sheep, where carrier contended that delay was due to bridges damaged by unprecedented floods, evidence that after other floods as great, damaging bridges in like manner, carrier had replaced them as they had theretofore been instead of changing them, would warrant a finding that delay was due not to act of God, but to negligence in construction of bridges.<sup>3</sup> Where shipment of sheep was delayed by wreck and

1. *American Locomotive Co. v. New York Cent. R. Co.*, 179 N. Y. S. 851.

In an action against railroad for death of horses from negligent delay in transportation, question as to time of arrival of shipment at point of destination, condition of horses, nature of disease from which they died, and whether such disease was caused by defendant's negligence, held question for jury. *Intercontinental Rubber Co. v. Chicago, B. & Q. R. Co.*, 179 N. Y. S. 3.

In an action against a carrier for damage to a shipment of live stock by delay, if the shipment was delayed by defendant, and on account of such delay plaintiffs' cattle were damaged in appearance and lost in weight by reason of "loss of fill," reasonably in contemplation, such loss of fill may properly be shown as affecting market value. *Texas & P. Ry. Co. v. West Bros.* (Tex. 1919), 214 S. W. 808.

2. *Intercontinental Rubber Co. v. Chicago, B. & Q. R. Co.*, 179 N. Y. S. 3.

3. *Kansas City, M. & O. Ry. Co. v. Backstone & Slaughter* (Tex. 1919), 217 S. W. 208.

In an action for damage to a shipment of sheep through delay, where the jury could not have found for defendants, the railroad and its connecting lines, under a requested special charge, unless they had found the delay was not due to the negligence of the railroad, and in answer to a special issue they found to the contrary, any error in refusing to defendant the requested special charge was harmless to it. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208.

In an action against a railroad for damage to a shipment of sheep by delay, evidence held to support the jury's answer to a special issue that the sheep sustained damage as the

washout of three bridges, the fact that the wreck and washout of one bridge were inevitable accidents does not relieve the carrier of liability where the wreck was cleared in time for the train to have crossed the bridge before washout had it not been for negligent construction of the other two bridges.<sup>4</sup> The mere fact that an express company can be taken over by the Government and required to give preference to Governmental shipments does not of itself excuse the delay in a private shipment.<sup>5</sup>

proximate result of delays which defendant railroad or its connecting carriers could have avoided by ordinary care, the evidence not showing delay was due to unprecedented floods, that is, an act of God. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208.

In action for damage to sheep by reason of delays, evidence that a wreck occurred on track ahead of sheep train made a *prima facie* case of negligence under doctrine of *res ipsa loquitur*. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208.

4. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208.

In *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208, the court said, p. 209:

"If it be admitted for the sake of argument that the overflows in each of the rivers were unprecedented, it does not appear that such overflows were the sole cause of the delay. On the contrary, it is conclusively shown that, for the wreck between Altus and these rivers, the sheep train would have crossed them before either of the overflows occurred. And so, if the wreck was occasioned by the negligence of the railway company, such negligence was the pri-

mary and approximate cause of the delay. The jury did not find, and were not requested to find, what specific act or acts of the defendant caused the delay. The extent of their finding is that some negligent act or acts of the defendant was the proximate cause of the delay. If their verdict can be sustained by legal evidence as to any alleged act of negligence, it is our duty to do so. Hence it becomes material to inquire as to whether the wreck was caused by the negligence of the railway company."

5. *Edwards v. American Ry. Express Co.* (Mo. 1919), 216 S. W. 781, 782.

Where the government had taken over the operation of express companies together with railroads, it was the duty of an express company to give preference to governmental shipments, the carriers having been taken over as a war emergency, and shipper cannot complain of a delay caused by giving preference to governmental shipments. *Edwards v. American Ry. Express Co.* (Mo. 1919), 216 S. W. 781.

In an action against an express company for damages for delay in delivery of a shipment of eggs which the shipper asserted resulted from a fall in market, evidence held not to conclusively show that the broker to whom the eggs were assigned by

Where railroad's agents, knowing that train was delayed, refused to permit shipper to unload stock for feed and water, and where because of such refusal the stock stood in cars at certain station for about 17 hours without water, the railroad was negligent, even though the delay was unavoidable.<sup>6</sup>

**Loss by Fire.** In action against railroad for cotton destroyed by fire while in its possession as carrier, books of railroad company, tending to show cotton was delivered to compress company according to custom and bill of lading constituting compress company agent of shippers to receive shipment, were improperly excluded.<sup>7</sup>

promptness could have obtained the same price as had the shipment been delivered seasonably and thus avoided the fall in market. *Edwards v. American Ry. Express Co.* (Mo. 1919), 216 S. W. 781.

That defendant express company, sued for negligent delay, was, like the railroads, under governmental control, is not conclusive proof that defendant, and its predecessor, was made such a governmental agency as to oust the state court of jurisdiction to enter judgment; the court not being required to take judicial notice of the facts in other cases determining the status of the carrier. *Edwards v. American Ry. Express Co.* (Mo. 1919), 216 S. W. 781.

6. *Kansas City, M. & O. Ry. Co. of Texas v. Cliett* (Tex. 1919), 216 S. W. 682.

In an action against a railroad by shippers of live stock for damages from delay in transit by loss of a market, the shippers' case being founded on negligence, the railroad was entitled to have it properly defined to the jury, and the requested charge, defining negligence and fault as used in an issue submitted, should have been given. *Quannah, A. & P.*

*Ry. Co. v. Collier* (Tex. 1919), 215 S. W. 838.

In an action by the consignee of seed potatoes for delay in delivery against the seller and a carrier of the shipment, evidence held not to show that the consignee was entitled to recover more than the \$500 damages found by the jury. *Hudgins Produce Co. v. Missouri Pac. R. Co.* (Ark. 1919), 215 S. W. 606.

7. *Illinois Central R. Co. v. Three-foot Bros. & Co.* (Miss. 1919), 83 Co. 635.

In an action for cotton destroyed by fire after delivery to an independent compress company, with which consignee had made arrangements to receive the goods from the railway company, and where it is shown that the customary way of making delivery was for the railway company to unload the cotton at the compress, to receive from the compress company cotton tickets identifying each bale by weight, number, etc., and to take said tickets to plaintiff's agent, who, upon surrender of the tickets, would pay the freight charges and surrender the bill of lading for said cotton to the company, and where it is shown that the consignments of cotton in

**Shipments Stopped in Transit.** A railroad is not relieved from liability for ore stolen from car placed on siding en route for sampling of ore, since railroad's agreement to leave car on siding temporarily en route for shipper's accommodation, not being authorized by uniform bill of lading, was unlawful under both the Elkins Act, § 1, and the Interstate Commerce Act, §§ 3, 6 and the Hepburn Act, § 2.<sup>8</sup> Under Elkins Act, § 1, and Hepburn Act, § 2 the carrier's agreement to temporarily leave car on siding en route solely for the shipper's accommodation, being unauthorized by uniform bill of lading, was unlawful, and not binding on it.<sup>9</sup>

controversy were promptly unloaded by the railway company, the compress tickets delivered to the railway company on the same day, and plaintiff's agent had been advised by the railway company that the cotton had been unloaded and that the company had the tickets, and upon his request the agent of the railway company promised to bring the tickets to the bank and turn them over to plaintiff's agent, but neglected to do so, held, since the railway company retained the tickets for its own convenience and benefit, and that since the plaintiff could not secure the cotton, as a matter of right, without the

tickets which represented the actual cotton, the railway company had not made delivery of the cotton in the manner usual at that place, and delivery not having been completed at the time of the fire, the relation of carrier and shipper still existed, and the railway company was liable to the plaintiff, as insurer, for the loss of said cotton. *Wichita Falls & N. W. Ry. Co. v. J. J. Brown Co.* (Okla. 1919), 183 Pac. 889.

8. *Siebert v. Erie R Co.*, 179 N. Y. S. 136.

9. *Siebert v. Erie R. Co.*, 179 N. Y. S. 136.

## CHAPTER IV.

### LIABILITY AFTER ARRIVAL AT DESTINATION.

**Negligent Acts in General.** If at the time of unloading sheep there was an unreasonable delay by the acts of defendant carrier, it was liable if damage resulted from such negligence, when the sheep were unloaded too late in the day and so were chilled; it having been its duty to place the cars in proper position for unloading with reasonable promptness.<sup>1</sup> In an action against a carrier for damages to sheep from delay in placing cars in position for unloading, the burden was on shipper to prove the carrier's negligence in delaying the unloading too late in the day, so that the sheep were chilled, was the proximate cause of their loss.<sup>2</sup>

**Conversion.** An express company is not liable for the conversion by its driver of goods received by him for transportation without directions from it, unless he had real or apparent authority to receive them and contract for their delivery.<sup>3</sup>

**Delivery and Misdelivery.** A carrier should have delivered shipment to consignee only, where there was nothing about the shipment to indicate that a party other than the consignee had the right to receive it.<sup>4</sup> Authority to an express driver to call for and receive goods for delivery under a contract with, or a call to the office of, the express company, gives no authority to

1. *Smart v. Oregon Short Line R. Co.* (Utah 1919), 183 Pac. 820. (State case.)

In an action against a carrier of sheep for injuries from delay in placing the cars in position for unloading, so that the sheep were chilled, evidence held insufficient to show negligence was the proximate cause of the damage. *Smart v. Oregon Short Line R. Co.* (Utah 1919), 183 Pac. 320. (State shipment.)

2. *Smart v. Oregon Shore Line*

*R. Co.* (Utah 1919), 183 Pac. 320. (State case.)

3. *Wolf Thread Co. v. Rosenbusch*, 180 N. Y. S. 94.

Evidence held insufficient to show that an express driver receiving goods for delivery without a direction from his employer had any apparent authority to contract in its behalf for their delivery. *Wolf Thread Co. v. Rosenbusch*, 180 N. Y. S. 94.

4. *Southern Express Co. v. Freeze* (Ark. 1919), 216 S. W. 303.

receive goods from a third party without the knowledge of the company, as this involves the making of a contract for the company.<sup>5</sup>

5. *Wolf Thread Co. v. Rosenbusch*, 180 N. Y. S. 94.

In *Wolf Thread Co. v. Rosenbusch*, 180 N. Y. S. 94, the court said:

"The plaintiff has recovered a judgment for the sum of \$895.67, the value of property alleged to have been delivered to the defendants, doing business as an express company. The goods were in fact stolen by the defendants' driver and never delivered. It appears from the testimony that previous to February 14, 1919, the plaintiff had never done any business with the defendants. That day an officer of the plaintiff company saw the driver of the defendants' wagon receive goods from a room occupied by another tenant in the same building. He called the driver to his own office and delivered to him two packages for delivery, and received a receipt, signed by the driver in the name of the defendants, but not upon one of its own blanks. These goods were delivered the same day. In the afternoon of the same day the driver returned to the plaintiff a receipt signed by the consignee of these goods, written on the back of one of defendants' blanks, and then the driver received other goods of the plaintiff for delivery in outlying districts of the city, but failed to deliver the goods, and also failed to return to the office of the defendants.

"It is, I think, quite evident that the defendants cannot be held liable for the conversion of these goods, worth \$895, unless the defendants had contracted with the plaintiff to receive them as a carrier for delivery as di-

rected by the plaintiff. If such a contract was made, it was made with the defendants' driver, and if such a contract was binding upon the defendants, then the driver must have had either real or apparent authority to receive goods without any directions from the office of the defendants, and to enter into a contract for the delivery of such goods.

"The record is naturally devoid of any evidence that any express authority to make such an agreement was conferred upon the driver, but the case was really tried upon the theory of apparent authority. I am entirely unable to find anything in the record that would justify the view that this driver had implied or apparent authority to receive goods for delivery without a direction from his employer. The only evidence of any kind which could be considered as relevant upon this point is that the driver on the morning of February 14th was directed by the defendants, from their office, to receive a package from a man in the same building in which the plaintiff's office was situated, and to deliver that package, and also that the driver received two packages from the plaintiff in the morning of the same day and delivered these packages. The fact that the driver actually received packages from the plaintiff on this previous occasion can be material and relevant only if the record permits the inference that the defendants acquiesced in their driver's act, or at least knew of it. The transaction occurred only a few hours before the delivery of

the goods for which the plaintiff now claims. Payment was made for cash, and the receipt not even given on a blank of the defendants, though thereafter the driver, as pointed out above, returned a receipt on the back of one of the defendants' blanks, signed by the consignee, and it appears that the defendants were not informed of the transaction.

"Under such circumstances I cannot see that the fact that the driver received goods of the plaintiff that morning can be regarded as any evidence that the defendants held out the driver as their agent to receive goods for delivery without previous arrangement with the office. I further cannot see that the evidence that the driver did have actual authority to call for and receive goods from a man in the same office building that same morning can be regarded as evidence of real or apparent authority to receive goods when casually offered by a stranger. In my opinion, there is a confusion in this case between authority to receive goods for delivery under a contract with, or a call to the office of, the express company, and authority to enter into a contract for such delivery and then to receive goods under such contract. Obviously, where a party had notified an express company to send for goods for delivery, and the express company thereafter sends a wagon for such goods, the person sent by the company for the goods has both real and apparent authority to receive such goods; but on the other hand, the fact that the driver of an express wagon, in sole charge of the wagon, has actual or apparent authority to receive goods, when sent

for such goods upon call to the office, does not to my mind, in the slightest degree, show that the same driver has implied or apparent authority to enter into a contract in behalf of the company with a stranger and then to receive goods under the contract so made.

"It is true that, since the defendants are engaged in the business of transporting goods for any person who hires them for that purpose, they are in law common carriers, but even common carriers cannot be held liable for the loss of goods not received and accepted by them, acting through their duly authorized agents, and where an express company actually restricts its business to the delivery of packages called for under orders given from their own office, no stranger can impose upon them an obligation to receive goods delivered to their drivers, or make the defendants' driver an agent of the defendants against the will of the defendants."

In action against express company for wrongful delivery, evidence held insufficient to constitute person to whom shipment was delivered an agent for consignee to receive shipments without consignee's knowledge or consent. *Southern Express Co. v. Freeze* (Ark. 1919), 216 S. W. 303.

Where a car of tomato pulp has been sold on credit and delivered to a carrier for transportation under a bill of lading designating a certain siding on which it was to be placed, the act of placing the car on such siding by the carrier constituted complete delivery. In *re Arctic Stores*, 258 Fed. 688.

## CHAPTER V.

### LIABILITY FOR NEGLIGENCE.

**In General.** A railroad carrier is liable for oil lost during transit, irrespective of negligence, unless it is shown that the loss was due to an act of God or like cause.<sup>1</sup> A carrier may limit its liability for negligence, where the shipper receives a consideration therefor.<sup>2</sup> Silver ore of the value of \$8,000 per ton are not articles of extraordinary value as defined by Section 6 of the bill of lading, which provides that the carrier will not transport any article of extraordinary value, unless there is a special agreement to do so.<sup>3</sup> In absence of a provision making the remedy

1. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

2. *American Locomotive Co. v. New York Cent. R. Co.*, 179 N. Y. S. 851.

3. *Siebert v. Erie R. Co.*, 179 N. Y. S. 136, 142. In this case through shipment of silver ore was made from Canada to Perth Amboy, N. J., and was stopped at Bergen Jct. for sampling. After having been sampled by a chemical company there, the car was sealed and during the night the seals were broken, and the car robbed. It was contended that the carrier was not liable because the car was standing on a private siding. The court held that Section 5 of the bill of lading with reference to car standing on private siding during transportation, and said, p. 139:

"There can be no doubt but that the car and the ore were in the possession of the defendant, as a common carrier, at the time of the theft. The defense, which was sustained by the learned trial court, was based upon

the provisions of the uniform bill of lading approved by and filed with the Interstate Commerce Commission, which relates only to interstate shipments; and it is conceded that the provisions thereof govern, although the defendant did not issue or deliver to the shipper any bill of lading. Both parties claim that his was a single contract for an interstate shipment, and not two contracts—one for a shipment from Cobalt to Bergen Junction, and the other from the latter point to Perth Amboy. It was regarded by the defendant as a single through contract. If there were two contracts of shipment, the defense would necessarily fail, for concededly the uniform bill of lading on which it is predicated has no application to an intrastate shipment, which a shipment from Bergen Junction to Perth Amboy would be.

"The uniform bill of lading, which concededly attached to the shipment when the freight was delivered to the defendant, although, as already stated, it delivered no bill of lading

therefor, contains provisions printed on the back thereof and made a part of the contract of shipment, among others, as follows:

"Sec. 5. \* \* \* Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

"Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any article of extraordinary value, not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon."

"The complaint was dismissed, on the theory that these provisions were applicable to the car while on the siding, and before it was attached to a train for the resumption of the transportation from Bergen Junction to Perth Amboy. These provisions would, doubtless, have relieved the defendant from liability for the theft, if it had occurred while the car was on siding awaiting shipment at the initial point, or awaiting delivery at the point of destination. See *Bers v. Erie R. R. Co.*, 225 N. Y. 543, 122 N. E. 456, affirming 176 App. Div. 241, 163 N. Y. Supp. 114; *Standard Combed Thread Co. v. Penn. R. R. Co.*, 88 N. J. Law, 257, 95 Atl. 1002, L. R. A. 1916C, 606. This being a through bill of lading, there could not be a lawful delivery by and redelivery to the carrier en route. Of course, the shipper would be estopped

from denying delivery, in so far as the ore was received and retained by its agent, Ledoux & Co.; but that is not the point here presented.

"We are of the opinion, therefore, that the defendant is not entitled to have those provisions applied to a car temporarily left on a siding en route, solely for the accommodation of the shipper, for such special accommodation to the shipper was not provided for or authorized by the uniform bill of lading, and it was therefore unlawful. *Elkins Act*, § 1, 32 Stat. 847, as amended by *Hepburn Act*, § 2, 34 Stat. 587 (*U. S. Comp. St.* § 8597); *Interstate Commerce Act*, § 3, 24 Stat. 380 (section 8565), and section 6, as amended by *Hepburn Act*, § 2 (section 8569). Other shippers paying the same rate for transportation were not entitled, under the uniform bill of lading and filed tariffs of the defendant, to such accommodation, and therefore the agreement to extend to this shipper the privilege to have the ore thus temporarily delivered en route came within the express provisions of the federal statutes cited, and was not binding on the carrier. *D'Utassy v. Southern Pac. Co.*, 174 App. Div. 547, 161 N. Y. Supp. 222, affirmed 225 N. Y. 694, 122 N. E. 879; *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Kansas Southern Ry. Co. v. Carl*, 227 U. S. 639-663, 33 Sup. Ct. 391, 57 L. Ed. 683; *D. L. & W. R. Co. v. U. S.*, 231 U. S. 363, 34 Sup. Ct. 65, 58 L. Ed. 269; *Missouri Pac. Ry. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; *Robinson v. N. Y. & T. Steamship Co.*, 63 App. Div. 211, 71 N. Y. Supp. 424; *Id.*, 75 App. Div. 431, 78 N. Y. Supp. 359, affirmed on both opinions 177 N.

under the Carmack Amendment to the Interstate Commerce Act exclusive, and in view of proviso that it shall not deprive any holder of an initial carrier's receipt or bill of lading from any remedy or right of action under existing law, the initial carrier, connecting carrier, or terminal carrier may all be held liable to the shipper for damage caused by their negligence.<sup>4</sup>

**Shortage.** In an action against a carrier for loss of gasoline in transit and excessive freight charges, the failure of the shipper to establish a shortage occurring during transit does not preclude him from going to the jury on the freight overcharge claim, where there was evidence that the carrier collected charges on a greater weight of gasoline than it delivered.<sup>5</sup>

**Initial Carrier.** Where cattle were shipped over three lines under a contract that "the carrier shall not be held or deemed liable for anything in connection with said stock beyond its own line of road, and in no event shall one carrier be liable for the negligence of another," "such condition to 'inure' to the benefit of all carriers," the initial carrier was liable for the entire damage, where cattle were lost while the shipment was in its hands and there was shrinkage by reason of delay on all the lines.<sup>6</sup>

Y. 565, 69 N. E. 1130; *London & Liverpool Fire Insurance Co. v. Railroad Co.*, 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752. The D'Utassy Case was not decided until after the trial and decision of the issues herein, and consequently the learned trial court did not have the benefit of the views therein expressed, which we think lead logically to the conclusion that the carrier in the case at bar, if relieved of liability while the ore was in the possession of Ledoux & Co., resumed possession as a carrier when its representative sealed the car into which the ore had been reloaded and delivered a receipt therefor to Ledoux & Co., and is therefore liable for the loss of the ore."

4. *Pacific Coast Borax Co. v. Shippers' Navigation Co.*, 178 N. Y. S. 182.

5. *Coad v. Pennsylvania Ry. Co.* (1a. 1919), 175 N. W. 344.

6. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex. 1919), 215 S. W. 866.

In *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex. 1919), 215 S. W. 866, 869, the court said: "Under the facts stated, the initial carrier, the Ft. Worth & Denver City Railway Company, was liable for the entire damage, but the liability of either of the appellants, as connecting carriers, was confined to such damage as might result from the neg-

**Connecting Carrier.** Where a connecting carrier, pursuant to single contract of shipment, placed car of silver ore on siding for sampling by shipper's agent, consented to removal of ore from car for sampling, left car to be reloaded when sampling process was finished, and knew upon reloading that there was a shortage in the number of bags, and where carrier under like conditions temporarily delivered considerable ore for sampling, the separation of silver metallics or nuggets from other ore and placing them in the car was not a fraud on the carrier, releasing it from liability for loss of the silver by theft; carrier being chargeable with notice of process of sampling, and being bound by knowledge of its agent acquired in receipting for ore.<sup>7</sup>

ligence of the particular carrier and there was no joint liability between them. *M., K. & T. Ry. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213; *Ft. Worth & Denver City Ry. Co. v. Hill*, 213 S. W. 952; *Eastern Railway Co. of N. M. v. Montgomery*, 139 S. W. 885; *A., T. & S. F. Ry. Co. v. Boyce*, 171 S. W. 1094. The appellee contends that, since the appellants did not object at the bar to the reception of the verdict, they waived objection thereto and the entry of judgment in accordance therewith. We have been referred to no authority, and have found none, which supports this position. If the liability of the two appellants was several and distinct, and not joint, the verdict and judgment rendered thereon was not merely defective or informal, but positively erroneous. *Filgo v. Citizens' National Bank*, 38 S. W. 237. In our opinion the objection in the motion for a new trial was sufficient to support an assignment complaining of this error."

A complaint alleging that an initial carrier delivered freight intrusted to it to a connecting carrier, not in the good condition in which it had been

received, showed that damage was sustained on line of the initial carrier, and stated a cause of action against it under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa). *Pacific Coast Borax Co. v. Shippers' Navigation Co.*, 178 N. Y. S. 182.

Where a car of bananas was received for shipment by defendant railway for delivery and the bill of lading recites in effect that defendant made shipment contract for itself and its connecting carrier and the latter acted thereon, under *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 731, 732, the defendant initial carrier is liable for connecting carrier's negligent failure to promptly notify consignee of car's arrival, notwithstanding a contrary stipulation in bill of lading (state shipment). *Galveston, H. & S. A. Co. v. Zemurray (Tex.* 1919), 215 S. W. 157.

7. *Siebert v. Erie R. Co.*, 179 N. Y. S. 136.

In an action against initial connecting and connecting carriers for loss of cattle, the court erred in submitting an issue as to the liabil-

**Delivering Carrier.** In absence of anything to show when a shipment was delivered to the delivering carrier, the presumption arises that a delay occurred on its line.<sup>8</sup>

ity of the connecting carriers, where the evidence was undisputed that the cattle were lost while in the hands of the initial carrier. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex. 1919), 215 S. W. 866.

Complaint alleging that damage to freight was caused while in the possession of the initial carrier, and not setting forth what part of the damage, if any, was sustained on each of the two lines, did not state a separate cause of action against the connecting carrier, in view of the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa). *Pacific Coast Borax Co. v. Shippers' Navigation Co.*, 178 N. Y. S. 182.

In an action for loss in shipment of stock under a contract wherein connecting carriers were only to be liable for damages occasioned by their own negligence, connecting carriers did not waive an objection to entry of a joint judgment against

them for damages by failing to object to the reception of verdict holding them jointly liable. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex. 1919), 215 S. W. 866.

Where cattle were shipped over three lines under a contract that "the carrier shall not be held or deemed liable for anything in connection with said stock beyond its own line of road, and in no event shall one carrier be liable for the negligence of another," "such contract to inure to the benefit of all carriers," the liability of a connecting carrier was confined to such damages as might result from its own negligence, and there was no joint liability between the connecting carriers. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex. 1919), 215 S. W. 866.

8. *Hudgins Produce Co. v. Missouri Pac. R. Co.* (Ark. 1919), 215 S. W. 606.

## CHAPTER VI.

### CIRCUMSTANCES RELIEVING CARRIER OF LIABILITY.

**In General.** A carrier having granted a shipper of ore the special privilege of having car placed on siding en route for sampling of ore, in violation of law, should not be permitted to defend, in shipper's action for loss of ore by theft, on ground that the separation of metallics from other ore constituted fraud, so as to release it from liability.<sup>1</sup> A carrier of live stock can exempt itself from liability for injuries in transit only by showing the death or injury of the stock was brought about by an act of God, the public enemy, or by the inherent nature, propensities, or viciousness of the animals, or the act or fault of the shipper.<sup>2</sup> In an action by a shipper for loss on a shipment of mules, evidence held to warrant a finding that the animals, which were confined in cars without food or water for more than 40 hours, ate off one another's manes and tails because of hunger.<sup>3</sup>

**Fault of Shipper.** If a shipper of live stock accompanies it and undertakes to perform certain duties of the carrier, such as providing feed and protection against storms and cold so far as facilities are afforded him, his engagement becomes a material consideration in determining the carrier's liability.<sup>4</sup> If

1. Siebert v. Erie R. Co., 179 N. Y. S. 136.

2. Louisville & N. R. Co. v. Hunter (Ky. 1919), 214 S. W. 914.

3. Hines v. Morgan (Ark. 1920), 218 S. W. 672.

4. Gibson v. Adams Express Co. (Ia. 1919), 175 N. W. 331.

Where the owner or his agent accompanies live stock in its shipment to give it care and attention, the burden is on the owner suing for damages from the carrier's failure to care for the animals to show that any injury during transportation was due

to some fault of the carrier's, a rule relating only to burden of proof. Gibson v. Adams Express Co. (Ia. 1919), 175 N. W. 331.

The rule that plaintiff may not profit by his own negligence, concurring with that of another, does not apply where damages resulting from defendant's negligence can be separated and distinguished from those resulting from plaintiff's contributory negligence, in which case recovery is limited to consequences flowing from defendant's negligence alone. Galveston, H. & S. A. Ry. Co. v. Crowley (Tex. 1919), 214 S. W. 721.

an express company carrying live stock knew it was unattended by the shipper or some one on his behalf, it was its duty to give necessary attention to the stock to prevent injury or damage thereto, though the agreement for shipment contemplated that the shipper or an agent would accompany the stock.<sup>5</sup>

**Inherent Character of Shipment.** A carrier not being an insurer of a shipment of live stock against injuries resulting from the poor and weakened condition of the stock is not liable for such injuries, but only for injuries arising from its own negligent acts or omissions.<sup>6</sup>

**Act of God.** In an action for damages to a shipment of sheep through delay, where the undisputed evidence showed that the negligence of the railroad concurred with an act of God in producing the delay it is liable for the result of such negligence.<sup>7</sup> It may be doubted, however, if this is the doctrine in the Federal Courts.

5. *Gibson v. Adams Express Co.* (Ia. 1919), 175 N. W. 331.

6. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Tex. 1919), 214 S. W. 721.

7. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208.

Where an act of negligence on the part of a carrier of live stock concurs with an act of God in producing an injury, and the injury would not have happened without the negligent act, the carrier is responsible for the damages arising from its act. *Kansas City, M. & O. Ry. Co. of Texas v. Blackstone & Slaughter* (Tex. 1920), 218 S. W. 552.

If the negligence of a railroad carrying live stock concurred with an act of God in causing floods as a proximate cause of injury to the stock by delay, and the injury would not have occurred without the negli-

gence of the railroad, the road was liable in damages to the shippers. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208.

In *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208, 210, the court said: "Under the facts as hereinbefore set forth, the jury was justified in finding that the delay was caused by the negligence of the railway company. At least, that the negligence of the railway company concurred with the act of God as a proximate cause of the injury, but for which negligence the injury would not have occurred. Such fact rendered the defendant liable in damages. *Mistrot v. Ry. Co.*, 209 S. W. 775; *Ry. Co. v. Penny*, 178 S. W. 971; *Wald v. Ry. Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 358, 53 Am. St. Rep. 332 (citing 1 Sher. & Redf. on Neg. 4th Ed., sec. 39); *Wolf v. Express Co.*, 43

Mo. 421, 97 Am. Dec. 406; Ry. Co. v. Curtis, 80 Ill. 324; Michaels v. Ry. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; McGraw v. Ry. Co., 18 W. Va. 361, 41 Am. Rep. 696; Deming v. Ry. Co., 48 N. H. 455, 2 Am. Rep. 267; Read v. Ry. Co., 60 Mo. 199; Davis v. Garrett, 6 Bing. 716; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Rodgers v. Ry. Co., 67 Cal. 607, 8 Pac. 377; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Ry. Co. v. Anderson, 94 Pa. 360, 39 Am. Rep. 787; Ry. Co. v. School District, 96 Pa. 65, 42 Am. Rep. 529.

"There is an irreconcilable conflict in the decisions on this question. We think the true rule is as stated in that admirable work, R. C. L., vol. 5, p. 222, in the following language:

"A common carrier is not, however, exempt from liability for a loss or for damages for delay which results from an act of God, if there is concurrent negligence in the carrier. In other words, an act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause."

"The same objection as to two issues being involved is made to special issue No. 2; that is, that it involves the issues of negligence as to the condition of the pens, and as to whether any damage resulted therefrom. The undisputed evidence showed that the sheep were damaged by reason of the condition of the pens. The only thing which the jury could have considered under this issue was negligence."

Where injury to live stock is produced by negligence of the carrier concurring with another cause from which it is exempt from liability by law, as the act of God, or by contract, and there is no negligence on the part of the shipper contributing to such injury, the carrier is liable in damages for its full amount. *Gulf, C. & S. F. Ry. Co. v. Culwell* (Tex. 1919), 216 S. W. 457.

In shipper's action against carrier for conversion defended upon ground that the goods had been taken from carrier under writ of attachment, evidence, *held* insufficient to prove that the goods taken under attachment were those shipped by plaintiff. *Gulf, C. & S. F. Ry. Co. v. McKie* (Tex. 1920), 217 S. W. 737.

## CHAPTER VII.

### FILING OF CLAIM.

**Manner and Form of Giving Notice.** Where a shipping contract for the carriage of live stock provided that the shipper, within four months, should file with some agent of the carrier a written claim for damages giving the amount of the damage, and stipulating that "no damages can be recovered except those set forth in the required written notice and claim aforesaid and in no greater amount than claimed in said notice," it is held, that such stipulation is reasonable, and that the shipper's right of recovery is limited to the specified items of damage set out in his written claim presented to the carrier, and allowances made by a jury in excess of any of the itemized claims thus presented by the shipper must be reduced and limited thereto.<sup>1</sup>

**Waiver of Notice.** A provision in the bill of lading requiring notice of damage cannot be waived by the carrier.<sup>2</sup>

1. *Caston v. Schaff* (Kans. 1919), 185 Pac. 33.

In an action for breach of shipment contract requiring shipper to deliver to carrier's freight claim agent within 10 days of time live stock is removed from cars any claim for damages, testimony that written claim was made and sent to the freight agent within such time, that he acknowledged receipt of the same, and that the documents had been lost, furnished sufficient prima facie proof.

*Thee v. Wabash Ry. Co.* (Mo. 1920), 217 S. W. 566.

2. *St. Louis, I. M. & So. Ry. Co., Evans* (Okla. 1919), 183 Pac. 609.

It has recently been held, however, against the weight of authority, that a carrier, issuing a bill of lading containing a four months' limitation provision for making claim for loss for failure to deliver, may waive such provision. *E. L. Welch Co. v. Chicago, M. & St. P. Ry. Co.* (Minn. 1919), 175 N. W. 109.

## CHAPTER VIII.

### DAMAGES RECOVERABLE.

**Limitation of Liability.** If a party charged with negligence, by giving proper attention to the subject under the circumstances of the particular case, should reasonably have contemplated the injury or loss alleged as being likely to occur as a proximate result of the negligence, the law holds the negligent party in damages whether such injury or loss was actually contemplated or not.<sup>1</sup> In an action for damages for tomatoes lost in packing houses and fields because of negligence in delaying the transportation of crates, the measure of damages is the value of the tomatoes at the time and place they were in fact lost.<sup>2</sup> A rate less than could and otherwise would be charged is sufficient consideration for limiting common-law liability for delay in

1. *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559.

An inference of fact, as that the market value of freight was decreased by the amount of increase in ocean transportation charges during delay in rail transportation to the ocean, may not be made on a submission of a controversy. *American Locomotive Co. v. New York Cent. R. Co.*, 179 N. Y. S. 851.

One who commits a trespass or other wrongful act is in general liable in damages for all the consequences directly resulting from the tort, whether foreseen by the wrongdoer or not, if the wrongful act is not interrupted by the intervention of an independent procuring or efficient cause, without which intervening cause the injury or loss would not have ensued and the plaintiff is not at fault. But in actions for damages alleged to have been caused by the mere negligence of one engaged in performing a public service as to which the law may imply a contract

or impose a duty, the damages for which recovery may be had are such as naturally and ordinarily arise out of or flow from the negligence, or such as may reasonably be supposed to have been contemplated at the time of the negligence as a probable result of it. *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559.

A contract, fairly entered into by a shipper and a carrier as to the value of goods accepted for shipment, is binding upon the shipper in an action for the loss of such property. *Noone v. Southern Express Co.* (Fla. 1919), 83 So. 607.

A shipper of goods by a common carrier is limited to a recovery of the declared value of such goods is an action by him for the loss of his property, though occasioned by the negligence of the carrier. *Noone v. Southern Express Co.* (Fla. 1919), 83 So. 607.

2. *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559.

transportation.<sup>3</sup> Where shipper did not sign release clauses on shipping order and bill of lading agreeing to limitation of carrier's liability, and where joint freight tariffs of carriers participating with initial carrier required signing of release clause for limitation of carrier's liability, a participating carrier whose freight tariff contained similar requirement, was not entitled to limited liability, notwithstanding it charged merely the reduced rate; the shipper not having signed release and not having been entitled to such reduced rate.<sup>4</sup> Carrier, having granted shipper of silver ore special privilege of having car placed on siding en route for sampling of ore, could not complain, in shipper's action to recover for theft, after separation from rest of ore, that the stolen ore constituted articles of extraordinary value, within section 6 of the uniform bill of lading, providing for a higher rate therefor, and had not been so classified, since the increased value was due to separation in process of sampling, made possible by carrier's unlawful agreement.<sup>5</sup> Liability for consequential damages from mere delay in transportation is released by provision of bill of lading that amount of any loss or damages, for which carrier may be liable, shall be computed on the basis of the property's value at place and time of shipment.<sup>6</sup> But the Supreme Court of the United States has recently held this provision void under the Cummins Amendment.

**Confiscation of Fuel.** Where property is converted by a common carrier to whom it has been intrusted for transportation, the measure of damages is the market value at the point of destination, less the cost of transportation.<sup>6½</sup>

3. *American Locomotive Co. v. New York Cent. Co.*, 179 N. Y. S. 851.

4. *Siebert v. Erie R. Co.*, 179 N. Y. S. 136.

5. *Siebert v. Erie R. Co.*, 179 N. Y. S. 136.

6. *American Locomotive Co. v. New York Cent. R. Co.*, 179 N. Y. S. 851.

6½. *Roth Coal Co. v. Louisville & N. R. Co.* (Tenn. 1919), 215 S. W. 404.

In an action by a coal company against a railroad for the conversion of carload lots of coal in transit, in the absence of anything to show that there was any wholesale market for coal in carload lots at destination at the time, the Court of Civil Appeals was warranted in fixing the coal company's damages from the conversion at the retail price of coal at destination, less the cost of transportation and marketing. *Roth Coal Co. v. Louisville & N. R. Co.* (Tenn. 1919), 215 S. W. 404.

**Delay in Transit.** In an action to recover damages for loss of tomatoes because of delay in transporting crates to be used in marketing the tomatoes, the claimant should show: (1) That the carrier was negligent in delaying the transportation and delivery of the crates: (2) that the claimant actually sustained a property loss as a proximate result of the carrier's negligence; (3) that the various elements of loss were such that, from the information imparted to the carrier or from common knowledge properly imputed to the carrier, they should reasonably have been regarded as naturally and ordinarily to result proximately from the negligence, or such as may reasonably under the circumstances stated be supposed to have been contemplated at the time by the parties as a probable proximate result of the negligence; (4) that the losses alleged are not remote, contingent, or conjectural, and are capable of reasonably certain ascertainment.<sup>7</sup>

7. *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559.

In *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559, plaintiff brought suit for the recovery of damages owing to the failure of the carrier to deliver crates to it for the packing of tomatoes in proper time. The crates having been delayed in shipment his crop of tomatoes was badly injured. The court said, p. 563:

"Before liability in damages for a negligent act or omission can arise, it is necessary that a causal relation, such as the law recognizes as being sufficient, should exist between the damage complained of and the act alleged to have occasioned the damage. If such a relation does not exist, the damage is said to be remote and cannot be recovered. If such a relation does exist, then the damage is said to be a proximate result of the wrongful act to which it is attributed, and conversely the wrongful act is

said to be the proximate cause of the damage.

"Only such damages may be recovered as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the particular character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier. *Williams v. Atlantic Coast Line R. Co.*, 56 Fla. 735, 48 South. 209, 24 L. R. A. (N. S.) 134, 131 Am. St. Rep. 169.

"The important questions to be decided are the special damages for which the defendant may be liable on the record, and the measure of the damages sustained.

"In order to recover damages, the plaintiff should show: (1) That the defendant was negligent in delaying the transportation and delivery of the crates; (2) that the plaintiff actually sustained a property loss as a proximate result of the defendant's negligence; (3) that the various elements of loss were such that, from the information imparted to the defendant or from common knowledge properly imputed to the defendant, they should reasonably have been regarded as naturally and ordinarily to result proximately from the negligence, or such as may reasonably under the circumstances stated be supposed to have been contemplated at the time by the parties as a probable proximate result of the negligence; (4) that the losses alleged are not remote, contingent, or conjectural, and are capable of reasonably certain ascertainment.

"One who commits a trespass or other wrongful act is in general liable in damages for all the consequences directly resulting from the tort, whether foreseen by the wrongdoer or not, if the wrongful act is not interrupted by the intervention of an independent procuring or efficient cause, without which intervening cause the injury or loss would not have ensued and the plaintiff is not at fault. But in actions for damages alleged to have been caused by the mere negligence of one engaged in performing a public service as to which the law may imply a contract or impose a duty, the damages for which recovery may be had are such as naturally and ordinarily arise out of or flow from the negligence, or such as may reasonably be supposed to have been contemplated at the

time of the negligence as a probable result of it. *Hall v. W. U. Tel. Co.*, 59 Fla. 275, 51 South. 819, 27 L. R. A. (N. S.) 639. If the party charged with negligence, by giving proper attention to the subject under the circumstances of the particular case, should reasonably have contemplated the injury or loss alleged as being likely to occur as a proximate result of the negligence, the law holds the negligent party in damages whether such injury or loss was actually contemplated or not. *McMillan v. Western Union Tel. Co.*, 60 Fla. 131, text 146, 53 South. 329, 29 L. R. A. (N. S.) 891.

"The special damages claimed as a proximate result of the delay in transporting crates are for stated large numbers of crates of tomatoes 'that the plaintiff was forced to allow to become over-ripe and rot in his field'; for a stated large number of crates of tomatoes that would have been produced on the same vines if the ripe tomatoes had been picked from the vines for shipment; for a stated number of crates of tomatoes which after the crates were delivered 'became over-ripe and unfit for shipment and spoiled in the field of the plaintiff' because plaintiff's working force was disorganized and lost while the crates were alleged in transit; and for \$998.50 expenses caused by idle labor, etc.

"Assuming that the allegations as to the notice to the defendant of the special damages likely to result from the delay in transporting the crates are sufficient, the evidence does not show that the defendant had actual notice as to the special damages claimed from alleged injury to the growing tomato vines because the

ripe tomatoes were not promptly picked therefrom, and notice from common knowledge thereof cannot legally be imputed to the defendant carrier even if such special damages are capable of reasonably accurate ascertainment. Such special damages appear to be remote or conjectural and not an ordinary result of the alleged negligence that should have been contemplated. Likewise the special damages claimed for a large number of crates of tomatoes lost after crates were delivered to the plaintiff by reason of disorganized labor forces, since such special damages were not called to the attention of the defendant carriers and they are not such ordinary results of the alleged negligence of the carrier as it should have anticipated, but such special damages are remote and conjectural.

"As to the value of the tomatoes lost, it is alleged:

"That the said tomatoes would have been, if properly packed and shipped with reasonable diligence, of a net value to the plaintiff of, to wit, one dollar and thirty-five cents (\$1.35) per crate."

"In *Seaboard Air Line Ry. v. Roberts*, 71 Fla. 28, 70 South. 773, it was held that—

"Where 'melons were not in fact tendered to the carrier, the proof should be clear and definite that damages as alleged were in fact sustained in the actual loss of marketable melons in the field, and that such loss was proximately caused by the defendant's unexcused breach of its contract or duty to furnish cars as alleged.'"

"The proofs here are that nearly all the tomatoes lost were on the grow-

ing vines, some being collected in a house; and that the question is: What is the correct measure of damages? From the notices given by the plaintiff to the defendant, the special damages contemplated appear to have been as to tomatoes left 'in packing house and fields' because of the lack of crates. With this in view, and considering the rule of law limiting recovery to damages proximately and not remotely caused by the delay alleged and to such values as are capable of reasonably certain ascertainment the proper measure of damage is the value of the tomatoes at the time and place they were in fact lost. In the absence of an established market value to be shown as a definite fact, opinions of competent witnesses as to the value of the tomatoes at the time and place they were lost as a proximate result of defendant's negligence would be permissible as calculated to show with some degree of certainty the values for which the defendant may be liable in damages. But opinions as to the value of tomatoes if they had been picked and packed in a special manner for final shipment to market would be based not on an existing fact, but upon a supposition more or less remote from the existent facts, and fraught with contingencies. If an established stable market value exists for a staple product in a marketable condition may be shown as a fact, it can only be used by calculation and deduction as tending to show, with all other circumstances pertinent thereto, the value of the product at the time and place it is lost, before it is placed in marketable condition.

"Only 45,000 crates were delayed in transit under the pleadings, and it

may be assumed the verdict has reference thereto. But shipments of tomatoes were made during the period of the delays, presumably in crates that had been delayed during the first of the period. These shipments should be considered in determining the number of crates of the tomatoes lost as a proximate result of the delay in transporting and delivering the crates.

"The verdict awarded the plaintiff \$44,460, with interest from the date of the action. This verdict is explained in the brief of counsel for the plaintiff, the defendant in error here, as follows:

"According to the testimony \* \* \* the tomatoes which rotted were ninety-seven per cent. fancy and three per cent. choice.' 'The market value of these tomatoes was one dollar and thirty cents (\$1.30) for fancy and ninety cents (\$.90) for choice tomatoes.' Plaintiff 'saved thirty cents (\$.30) on each crate by not having to pick, pack, and grade them and load them on the cars.' 'The method of the calculation is perfectly clear. Ninety-seven per cent. of forty-five thousand crates, or forty-two thousand, six hundred fifty crates, at one dollar and thirty cents (market value per crate, less thirty cents, amount saved to Peters) equals one dollar per crate, or forty-two thousand, six hundred fifty dollars; three per cent. (choice), equals one thousand three hundred fifty crates, at ninety cents (market value per crate less thirty cents, amount saved to Peters) equals sixty cents per crate, or eight hundred ten dollars. Forty-two thousand, six hundred fifty dollars (\$42,650.00) plus eight hundred ten dollars (\$810.00) equals forty-

four thousand four hundred sixty dollars (\$44,460.00), or the amount of the verdict.

"It will be seen that the jury did not allow to the plaintiff any damages for the disorganization of his crew or the deterioration of his vines, although both were properly allowable under the testimony. The only conclusion which can be reached is that the jury was not certain in its own mind whether these losses were the proximate result of the defendant's negligence or not.

"Assuming that the jury rendered the verdict on the calculation suggested by plaintiff's counsel as quoted above, and that there was an established market value at the place for tomatoes packed and ready for shipment, there is evidence that picking, packing, etc., cost 30 cents per crate, and that when so packed they were worth stated prices per crate according to grade, which may tend with other facts and circumstances to show the value of the product as lost; but it does not clearly appear from the testimony what was the value of the tomatoes at the time and place they were lost as a proximate result of the negligence of the defendant as alleged, or that the verdict does not include damages for crates of tomatoes lost by reason of nonproduction and the disorganization of plaintiff's labor force after he had received the crates, for which two items damages are not recoverable as stated above, because their loss was apparently not a proximate result of defendant's negligence that should have been contemplated or anticipated. Plaintiff concedes that the jury was not certain that the expenses incurred because of plaintiff's

**Tracing and Incidental Expense.** A shipment of locomotives consigned to New York City was damaged in transit and returned to the shipper for repairs. After some sixty days the shipment was repaired and reforwarded. In the meantime the ocean freight was advanced. Suit was brought to recover such increase in the ocean freight. In holding that the measure of damages in the case was depreciation in market value the court said:<sup>8</sup> "The sole point presented for decision is whether the plaintiff is entitled to recover the amount of the increase in the rate of freight for ocean transportation. The submission contains no stipulation with respect to any change in the market value of the freight, either at the point of shipment, or at the port of New York, or at the port to which the freight was intended for export, either at the time the shipment was made, or when it should have been delivered in New York, or when it was delivered there, or when it would have reached the port in South Africa, had it not been for the delay, or when it actually reached that port. It is conceded that the defendant assumed the liabilities

disorganized labor forces 'were the proximate result of the defendant's negligence.' Besides this, the shipments of tomatoes made in delayed crates should have been considered in determining the number of crates of tomatoes lost because of the defendant's delay in transporting the crates.

"It is apparent that the damages recoverable were not clearly and fully shown so as to be ascertained with reasonable certainty."

8. *American Locomotive Co. v. New York C. R. Co.*, 179 N. Y. S. 851, 852.

In *Texas & P. Ry. Co. v. West Bros.* (Tex. 1919), 214 S. W. 808, the court said: "We think it is clear from what we said that it is a matter of proof as to whether

plaintiff suffered any 'loss of fill,' affecting the market value of his cattle, and chargeable to any failure on the part of defendant railway company. We do not think the language used by us in the original opinion is capable of being construed into a holding that plaintiffs could contract so as to recover because the cattle had been fed twice en route and thereby failed to take on 'extra fill.' Our holding the verbal contract void destroys such construction. However, if the shipment was delayed by the defendant company, and on account of such delay plaintiffs' cattle were damaged in appearance and lost in weight by reason of 'loss of fill' reasonably in contemplation, such 'loss of fill' is proper to be shown, not that plaintiff recovers for 'loss of fill' as such, but their damages in market value as affected by such loss."

of its predecessor. The defendant claims that it is exempted by the bills of lading from liability for mere delay in transportation, and that, even if liable therefor, the increase in the freight rate for ocean transportation is not the measure of its liability. Plaintiff claims that the provisions of the bill of lading limiting the liability of the carrier do not embrace unreasonable delay in transportation, and that the market value of the freight when finally delivered at New York for export was less by the amount of the increased freight than its market value would have been if delivered without unreasonable delay, and that likewise its market value at the ultimate point of destination, when delivered, was less by that amount than it would have been, had it been received here in due course of transportation. The contentions of the plaintiff with respect to the depreciation in the market value of the freight cannot be sustained on his submission, for they involve inferences of fact which may not be made on a submission of a controversy. A carrier's liability at common law for unreasonable delay in transportation is the difference between the market value of the freight at the time and place when delivered and its market value at the time and place when it should have been delivered. *Ward v. New York Central R. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405. There being no stipulation with respect to the market value of the freight at any time or place, it is unnecessary to decide whether the liability at common law would depend on the market value here or in South Africa; but it may be observed that, since these were not through bills of lading, it would seem that the liability would be determinable by the market value at New York, which was the end of the transportation by the carrier according to the bills of lading which it issued. See *Frey v. N. Y. C. R. R. Co.*, 114 App. Div. 747, 100 N. Y. Supp. 225. I am of opinion, therefore, that the plaintiff cannot recover on the submission even if we should hold that the carrier's liability was not limited by the bills of lading. I am also of opinion that the carrier would not be liable under the bills of lading for damages for a depreciation in market value resulting from mere delay in transportation without injury to the freight or for the increased cost of ocean transportation. Here the carrier concededly has reimbursed the shipper for all injury to the freight. A provision

in a bill of lading limiting the liability of a carrier from its full liability at common law or by statute, without consideration to the shipper by way of a reduced rate of transportation or otherwise, would be unreasonable and void; but here there was a consideration therefor running to the shipper, in that it received a material reduction in the rate of transportation, which lawfully might have been and would have been charged, but for the agreement that the shipments were to be made according to the obligations of the carrier contained in the uniform bill of lading, and that affords a sufficient consideration for the limitation of the common-law liability. *Burke v. Union Pacific Ry.*, 226 N. Y. 534, 124 N. E. 119. *Grossman Mfg. Co. v. N. Y. C. R. R. Co.*, 181 App. Div. 764, 169 N. Y. Supp. 213; *Shaffer v. C. I. & P. R. R. Co.*, 21 Interst. Com. Com'n R. 8; *St. Louis, I. M. & S. R. R. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21, 3 Ann. Cas. 582; *K. C. & M. R. R. Co. v. Oakley*, 115 Ark. 20, 170 S. W. 565; *Southern Co. v. Cofer*, 149 Ala. 565; 43 South. 102; *Pittsburg, etc., v. Knox*, 177 Ind. 344, 98 N. E. 295; *New York, etc., v. Produce Exchange*, 122 Md. 215, 89 Atl. 433; *Produce Reporter Co. v. Adams Express*, 176 Ill. App. 74; *L. & N. R. R. Co. v. Oden*, 80 Ala. 38; *Rogan v. Wabash R. R. Co.*, 51 Mo. App. 665; *Grubbs v. Atlantic Coast Line R. R. Co.*, 101 S. C. 210, 85 S. E. 405; *Crenshaw v. Sou. Pac. R. R. Co.* (Cal. App.) 181 Pac. 252; *Olcovich v. Grand Trunk Ry. Co.* (Cal.) 176 Pac. 459. In some jurisdictions it appears to have been held that a carrier cannot relieve itself from liability for negligence, even by giving as a consideration a reduced rate of transportation. See *Ruppel v. Allegheny Valley Ry. Co.*, 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. Rep. 666; *Balt. & Ohio Ry. Co. v. Oriental Oil Co.*, 51 Tex. Civ. App. 336, 111 S. W. 979. But in *Burke v. Union Pacific Ry.*, supra, our Court of Appeals held that it is competent for a carrier to limit its liability, even for negligence, where the shipper receives a consideration therefor. The provisions of the bills of lading in question, under which the carrier claims that it is not liable for mere delay, were as follows: 'Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon.

Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable. Any carrier or party liable on account of loss of or damage to any of the said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.' Under a like bill of lading this court held in *Grossman v. N. Y. C. R. R. Co.*, supra, that the carrier was released from liability for 'consequential damage arising either from its delayed delivery or from an inability to use' the freight 'for any period of time' on account of its damaged condition. Counsel for the plaintiff relies on the decision of this court in *Meyer v. N. Y. C. R. R. Co.*, 185 App. Div. 812, 174 N. Y. Supp. 93; but there the bill of lading was quite different, and the provisions thereof were construed as relating only to loss or damage to the freight, and were not deemed broad enough to include damages caused by delayed delivery. In *Gulf, C. & S. F. Ry. Co. v. Texas Packing Co.*, 244 U. S. 31, 37 Sup. Ct. 487, 61 L. Ed. 970, where the bill of lading was similar to the one in the case at bar, it was held that the bill of lading limited the liability of the carrier to the

difference between the value of the freight, which consisted of dressed poultry, at the time and place of shipment, and its value at the time of delivery at a changed place of destination, agreed upon by the shipper and the carrier. In that case, however, the damages evidently were caused by a failure to maintain a proper temperature for the poultry, and not by delay in transportation. In *New York, P. & Norfolk Ry. v. Peninsula Exchange*, 240 U. S. 34, 36 Sup. Ct. 230, 60 L. Ed. 516, L. R. A. 1917A, 193, where a shipment of berries had been damaged by delay in transportation, and a recovery had been had in the state court of Maryland on the theory that the carrier was liable for damages caused by the delay, although the bill of lading was like those now under consideration, the United States Supreme Court upheld the recovery, as I understand the decision, not on the theory adopted below, but on the theory that the verdict could be sustained on the ground that the berries as delivered in a damaged condition were worth less by the amount of the verdict than when shipped. There are decisions in other jurisdictions, based on somewhat similar provisions of bills of lading to those now under consideration, holding that the 'loss or damage' specified in the bill of lading does not include loss incident to unreasonable delay in transportation. *Klass Comm. Co. v. Wabash R. R. Co.*, 80 Mo. App. 164; *C. R. I. & P. R. R. Co. v. Cunningham Comm. Co.*, 127 Ark. 246, 192 S. W. 211; *Ruppel v. Allegheny Valley Ry. Co.*, *supra*. See, also, *Wallingford v. A. T. & S. F. R. R. Co. (Kan.)* 167 Pac. 1136. But I think we should adhere to the construction of this clause in the bill of lading which was given to a like clause in *Grossman v. N. Y. C.*, *supra*, and should hold that the liability of the carrier for mere delay in transportation has been released."

**Invoice Price Under Bill of Lading.** It has recently been held by the Supreme Court of Nebraska that the provision in the uniform bill of lading in respect of an interstate shipment that the amount of loss or damage for which the carrier shall be liable in case of loss shall be computed as of the value represented by the bona fide invoice price, if any, at the place and time of shipment, including the freight charges, if prepaid, is not a limitation of the carrier's liability for negligence. This case however does not refer to the prior decisions of the Federal

Courts in the McCaull-Dinsmore case (affirmed by the United States Supreme Court May 17, 1920) or the Interstate Commerce Commission in the Bill of Lading case.<sup>9</sup>

9. Bowman-Kranz Lumber Co. v. Bush (Nebr. 1920), 176 N. W. 91.

In Bowman-Kranz Lumber Co. v. Bush (Nebr. 1920), 176 N. W. 91, the court said:

"Plaintiff recovered a judgment for \$162.94 for the conversion of a car of coal purchased at Paris, Ark., and consigned to Omaha, Neb., where upon arrival the shipment was inadvertently delivered by defendant to a company other than the consignee. The district court held that the value at destination should determine the measure of damages, and judgment was rendered accordingly. The defendant appealed.

"The case is submitted on an agreed statement of facts. The sole question to be determined is whether the value at the place of shipment or at the place of destination should govern in computation of damages. We conclude that under the facts here presented and the authorities the former should govern.

"Defendant relies upon the uniform bill of lading to sustain its contention, which, among other provisions, contains this:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon, or is determined by the classification or tariffs upon which the rate is based, in any

of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

"Plaintiff argues that the provision in question is an attempt to limit the liability of the carrier for negligence, and that it is therefore void under the Cummins Amendment to the Interstate Commerce Act (8 U. S. Comp. St. 1916, § 8604a). The recent decisions seem to hold otherwise. This provision has been construed and held by the Interstate Commerce Commission and by the federal and state courts to be a reasonable rule by which to determine the value of a shipment in case of loss, and that it is not a limitation of the carrier's liability for negligence. *Shaffer & Co. v. Chicago, R. I. & P. R. Co.*, 21 Interst. Com. Com'n R. 8; *Springfield Light, Heat & Power Co. v. Norfolk & W. R. Co.* (D. C.) 260 Fed. 254; *Wallingford v. Atchison, T. & S. F. R. Co.*, 101 Kan. 544, 167 Pac. 1136, L. R. A. 1918B, 716. Under the Cummins amendment it has been upheld. In re Cummins Amendment, 33 Interst. Com. Com'n R. 682, at page 693. Some of the authorities point out that the rule is salutary, in that the invoice value of the shipment, with freight added where it has been prepaid, can be readily ascertained, and that prompt settlement can be made by the parties without resort to tedious and expensive litigation.

"At the trial it was agreed that the value at the point of shipment was \$90.90, which with accrued interest

**Rough Handling in Transit.<sup>10</sup>**

**Special Damages.** Only such damages may be recovered as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to a contract of carriage. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the particular character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier.<sup>11</sup>

**Punitive Damages.** Punitive damages are not allowed, except where the carrier recklessly disregards the rights of the claimant.<sup>12</sup>

to the date of filing the answer was \$95.41, when defendant offered to confess judgment for that amount. The judgment is therefore affirmed, upon condition that plaintiff within ten days remit all in excess of \$90.90, with interest at 7 per cent. from date of shipment to date of offer to confess judgment. The costs in district court and in this court subsequent to the offer to confess judgment are to be paid by plaintiff."

10. Where carrier had taken charge of cattle under contract stipulating that it would not be responsible for overloading, refusal to instruct jury not to consider damages caused by overloading of cattle *held* error. *Panhandle & S. F. Ry. Co. v. Sanderson* (Tex. 1920), 218 S. W. 540.

11. *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559.

In negligence actions special damages cannot be recovered where the defendant had no notice, actual or constructive, that such damages should have been contemplated as a proximate result of the negligence alleged. *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559.

12. *Sommerville v. Chesapeake & Potomac Telephone Co.*, 258 Fed. 147.

Plaintiff telephone subscriber *held* not entitled to punitive damages because defendant telephone company stopped serving him on account of his failure to pay disputed telephone charges. *Sommerville v. Chesapeake & Potomac Telephone Co.*, 258 Fed. 147.

## CHAPTER IX.

### ACTIONS AT LAW FOR DAMAGES.

**Jursdiction of Courts.** If the Supreme Court of the United States may entertain jurisdiction of an action for damages for mental anguish, due to failure to send interstate message, the rule adopted by that court for determining the measure of damages is binding upon the courts of Texas.<sup>1</sup>

**Pleading.** A shipper of horses by rail, who for damages to them mistook his remedy, and brought action of tort at common law against the initial carrier, in which action he took voluntary non-suit, is not precluded, through any election of remedies, from bringing action in contract against the carrier under the Carmack Amendment to the Hepburn Act.<sup>2</sup> At common law, "retraxit" was an open voluntary renunciation of a claim in court, by which plaintiff forever lost his action thereon, differing from nonsuit, after entry of which plaintiff may begin his suit again.<sup>3</sup> While plaintiff in an action for negligent delay in interstate shipment has the burden of proving negligence, it is only necessary to show circumstances raising a slight inference

1. *Western Union Telegraph Co. v. Epley* (Tex. 1920), 218 S. W. 528.

It is only by virtue of the principle of comity that the plaintiff can ask the courts of Texas to enforce a transitory action which occurred in Arkansas. *Western Union Telegraph Co. v. Epley* (Tex. 1920), 218 S. W. 528.

2. *Hayden v. Maine Cent. R. Co.* (Mo. 1919), 108 Atl. 681.

In shipper's action against railroad for damage to cattle, shipper's allegations that the railroad was negligent by reason of delays on sidings and switches, rough handling, and sudden stop of train because of

collision, or near collision, with motorcar or section hand car, resulting in damage to cattle, held sufficient, as against objection that allegations were too general and did not specify in what the alleged negligence consisted. *Panhandle & S. F. Ry. Co. v. Sanderson* (Tex. 1920), 218 S. W. 540.

Interstate shipment is governed by federal law as regards the burden of proving negligence in delay in transportation, and not by Laws 1913, p. 177. *Burgher v. Wabash Ry. Co.* (Mo. 1920), 217 S. W. 854.

3. *Hayden v. Maine Cent. R. Co.* (Mo. 1919), 108 Atl. 681.

of negligence, some cause for the delay unexplained by defendant.<sup>4</sup>

**Competency of Witnesses.** In an action against an express company for damage to a shipment of horses, testimony of plaintiff shipper that, when he arrived on the train with the horses at a point in Iowa, he was informed by a stranger, who said he was the agent of the express company in charge of another car, that he could not ride to Chicago on the train with the horses, etc., held harmless to defendant express company in view of carrier's duty to care for horses.<sup>5</sup> Where testimony was admissible for some purpose other than in support of a plea in confession and avoidance, the trial court could not properly have excluded it on account of failure to interpose such plea.<sup>6</sup> The fact that a person charged to load cars makes entries in a memorandum book which is not a part of the general books of account will not qualify him to state the contents of a railroad shipment, even though such contents were entered in his memorandum book at the time of loading.<sup>7</sup> A person having no personal knowledge as to the matter involved may not testify as to what others did regarding it.<sup>8</sup> A witness who did not issue shipping receipts or bills of lading, sees them for the first time as a witness, and has no personal knowledge regarding the matter cannot testify whether such papers correctly describe a particular shipment.<sup>9</sup> The mere fact that a witness knows a bill of lading existed or that he has seen it does not qualify

4. *Burgher v. Wabash Ry. Co.* (Mo. 1920), 217 S. W. 854.

5. *Gibson v. Adams' Express Co.* (Ia. 1919), 175 N. W. 331.

6. *Gibson v. Adams Express Co.* (Ia. 1919), 175 N. W. 331.

7. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

A witness testifying from entries in a book other than the regular general business books cannot testify as to entries not made by himself. *Coad*

*v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

The mere fact that witness billed a car loaded by another does not qualify him to testify regarding its contents, starting point, destination, consignee, or time of shipment. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

8. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

9. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

him to testify that it correctly described the shipment.<sup>10</sup> A witness may not testify that a shipment was consigned to a certain destination and consignee upon no foundation except that a shipment consigned to a certain place or consignee is supposed to go there.<sup>11</sup> A witness having no personal knowledge except what he gets from books and records kept by his book-keeper cannot testify regarding the origin, destination, contents, etc., of a railroad shipment; such testimony not being the best evidence.<sup>12</sup> The fact that a witness has a record concerning the details of a railroad shipment does not qualify him to testify, where he has no personal knowledge regarding the matter.<sup>13</sup> A witness without personal recollection of a matter except from a record kept by another cannot testify regarding the transaction.<sup>14</sup> Where book entries are made partly by a witness and partly by several others who do not testify, the witness may not testify from such entries regarding the details of a railroad shipment.<sup>15</sup>

**Admissibility of Evidence.** In a consignee's action against a carrier for loss during transit, regular book entries, or copies thereof, of the shipper as to material matters involved are inadmissible.<sup>16</sup> In an action against a carrier for loss during transit, an invoice by the shipper setting forth the goods shipped and other correspondence between the shipper and the consignee regarding the alleged damage is inadmissible.<sup>17</sup> In an action against a carrier for loss during transit, testimony that a bill of lading was made is admissible, where the original bills were not available

10. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

A witness who made out bills of lading or shipping receipts may not state their contents nor testify that the shipment was such as the paper described, unless it be in a case where either shipper or consignee are impleading the carrier for shortage or overcharge. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

11. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

12. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

13. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

14. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

15. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

16. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

17. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

and it was desired to introduce duplicate bills.<sup>18</sup> The mere fact that a person having charge of correspondence between seller and buyer has advised the buyer regarding the details of shipment is inadmissible in an action by either shipper or consignee against the carrier.<sup>19</sup> Information gathered wholly from a journal in which the witness made entries from data furnished by other persons who attended to the loading of the commodity shipped, and regarding which the witness has no personal knowledge, is inadmissible.<sup>20</sup> The rule making books of account admissible in evidence does not extend to special memorandum records kept by some employe for himself, although he makes the entries at the time he performs his work.<sup>21</sup>

**Questions for Jury.** In an action by a shipper against a carrier of live stock which kept the animals confined without food or water for more than thirty-six hours, although it was the car-

18. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

19. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

20. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

21. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

A chief clerk in manifest bureau of defendant railroad, with whom plaintiffs claimed to have contracted regarding the furnishing of live stock cars, held apparently authorized to represent defendant. *Southern Pac. Co. v. Stevens*, 258 Fed. 165.

In action for failure to furnish live stock cars, plaintiffs' telegrams and letter to defendant demanding cars and threatening to hold it liable for damages, etc., held admissible, and objection should have been specifically made to any self-serving portions thereof. *Southern Pac. Co. v. Stevens*, 258 Fed. 165.

In action against a carrier for loss of gasoline during transit, duplicate freight bills and bills of lading are admissible where the originals were attached by plaintiff to claims presented to the initial carrier, and defendants, after demand, were unable to produce them at time of trial. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

In an action against a carrier for loss during transit, any error in excluding testimony regarding the origin and destination of the shipment was harmless, where the only controversy was as to the amount of gasoline received and delivered by the carrier. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

In action to recover for failure to furnish live stock cars, a written statement of freight rates delivered to plaintiffs by defendant's agent and prepared by clerk in agent's office is admissible, although not actually prepared by agent himself. *Southern Pac. Co. v. Stevens*, 258 Fed. 165.

rier's duty, under Act of Congress, June 29, 1906, to unload, feed and water the animals, the shipment being an interstate one, an instruction in effect assuming that it was the duty of the carrier to feed and care for the stock is not prejudicial, and the carrier cannot complain, particularly when the assumption was on the condition that the carrier would not be liable in event the shipper, who accompanied the animals, was himself negligent.<sup>22</sup> The finding of a trial court sitting as a jury in a law case is conclusive as to the facts, if there is any substantial evidence to support it.<sup>23</sup> Evidence that the chief clerk in the manifest bureau of defendant railroad acted as the traffic manager's assistant in agreeing to furnish plaintiff's live stock cars for a shipment originating on a connecting road, etc., held to make his authority to bind defendant a jury question.<sup>24</sup>

**Instructions, Verdict and New Trial.** Where a complaint alleged that a certain agent of defendant carrier agreed to furnish plaintiff live stock cars, any error in admitting a conversation regarding the agreement by another agent is cured by instruction that recovery must be based on the contract made with the agent named in the complaint.<sup>25</sup>

**Appeal.** The action of a court in permitting a witness to testify as to market value will not be held error on appeal on the ground that the qualification of the witness was not shown, in

22. *Hines v. Morgan* (Ark. 1920), 218 S. W. 672.

23. *Buften v. Southern Express Co.* (Mo. 1920), 217 S. W. 630.

24. *Southern Pac. Co. v. Stevens*, 258 Fed. 165.

25. *Southern Pac. Co. v. Stevens*, 258 Fed. 165.

Refusing requested instructions is not reversible error, where no exception was taken to general charge, since it will be presumed that charge which was given properly presented

all questions. *Southern Pac. Co. v. Stevens*, 258 Fed. 165.

Requested instruction, taking decision of question of fact from the jury, was properly refused. *Hayden v. Maine Cent. R. Co.* (Me. 1919), 108 Atl. 681.

Where plaintiff secured verdict, but defendant excepted, and prevailed on his exceptions, the verdict was set aside, and the rule that there can be no nonsuit, voluntary or otherwise, after verdict, ceased to be operative, so that plaintiff could take voluntary nonsuit. *Hayden v. Maine Cent. R. Co.* (Me. 1919), 108 Atl. 681.

the absence of a showing of abuse of discretion.<sup>26</sup> It is the duty of the appellate court to uphold a judgment of the trial court sitting as a jury in a law case, unless it is wholly unsupported by any reasonable theory of the case presented by the pleadings and the evidence, where there were no objections to the evidence and only one instruction was asked, which was that the plaintiff was not entitled to recover under the pleadings and evidence.<sup>27</sup> When exceptions are sustained in jury cases, as well as in those tried before a single justice without the aid of a jury, trial de novo follows under the mandate of the Supreme Judicial Court, unless it is otherwise decided and stated in the rescript.<sup>28</sup>

26. Gulf C. & S. Ry. Co. v. McKie  
(Tex. 1920), 217 S. W. 737.

28. Hayden v. Maine Cent. R. Co.  
(Me. 1919), 108 Atl. 681.

27. Bufton v. Southern Express  
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# **The Loss and Damage Review**

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**By**  
**HERBERT C. LUST**

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**THE  
LOSS AND DAMAGE  
REVIEW**



## CHAPTER I.

### CONTROL AND REGULATION OF CARRIERS.

**Federal Legislation.** The liability of a carrier of interstate shipments is governed by the acts of Congress and the common law as accepted and applied in the federal tribunals.<sup>1</sup> In actions for damages to interstate shipments, the state courts are bound by the federal decisions in regard to the burden of proof of negligence, and in regard to whether the negligence of the carrier, if established, constitutes the proximate cause of the damage.<sup>2</sup>

#### **The Cummins Amendment.<sup>3</sup>**

**Determination of Status.** A bill of lading for the shipment of live stock which read from Columbia to St. Louis, Mo., but provided by writing across its face that the destination was a point in Mississippi, the health certificate required and the 36-hour release permitted by federal law being attached, showed that the shipment was one to Mississippi, accepted as such by the federal Director General, and therefore interstate.<sup>4</sup>

1. *Singer v. American Express Co.*, (Mo. 1920), 219 S. W. 662.

The rights and liabilities of parties to an interstate shipment depend on acts of Congress, the bill of lading, and the common-law rules as accepted and applied in the federal tribunals. *Clemons Product Co. v. Denver & R. G. R. R.* (Mo. 1920), 219 S. W. 660.

2. *Rezsek v. Southern Pac. Co.*, 181 N. Y. S. 117.

3. The Carmack Amendment, mak-

ing an interstate carrier liable for "any loss, injury or damages caused by it or a succeeding carrier to whom the property may be delivered," refers to liability arising from some default in its common-law duty as a common carrier, and does not make the carrier an absolute insurer against every loss, though due to uncontrollable forces. *Singer v. American Express Co.* (Mo. 1920), 219 S. W. 662.

4. *Bradford v. McAdoo* (Mo. 1920), 219 S. W. 92.

## CHAPTER II.

### BEGINNING OF LIABILITY.

**Delivery to the Carrier.** It is the common-law duty of a common carrier to bring a shipment safely through at all hazards, save the act of God, the public enemy or the inherent nature of the freight.<sup>1</sup> In the absence of a bill of lading in case of an interstate shipment, the requisite stipulation of the contract, as prescribed by the federal statutes or valid regulations of the Interstate Commerce Commission, will attach and govern the rights of the parties.<sup>2</sup>

**Liability of Carriers Under the Common Law.** In an action against a carrier for loss of goods by fire while awaiting transportation, the claimant makes a prima facie case of negligence by proof of delivery of the goods to the carrier and non-delivery by the carrier at destination.<sup>3</sup>

**Nature and Functions of the Bill of Lading.** An instrument issued by a carrier to a consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to destination, is a "bill of lading."<sup>4</sup> The term "shipper's

1. *Singer v. American Express Co.* (Mo. 1920), 219 S. W. 662.

2. *Aman v. Dover & Southbound R. Co.* (N. C. 1920), 102 S. E. 392.

3. *Brass v. Texarkana & Ft. Smith Ry. Co.* (Tex. 1920), 218 S. W. 1040.

4. *Aman v. Dover & Southbound R. Co.* (N. C. 1920), 102 S. E. 392.

In *Aman v. Dover & Southbound R. Co.* (N. C. 1920), 102 S. E. 392, the Court said, p. 393:

"As to the other question: An instrument issued by the carrier to the

consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination, is a bill of lading. Of course it is not essential that a bill of lading be issued, for in the absence of any such instrument the rights of the shipper and the duty of the carrier are to be determined by the common law. 6 Cyc. 417. It may therefore, for the sake of discussion, be conceded that the paper signed only by Francke & Co. was not a bill of lading. 6 Cyc. 417, note 80, and cases cited. Such a bill was not re-

order," as used in bills of lading, is well understood, and means that the title remains in the shipper until he orders the delivery of the goods. Under a shipment of a car of corn consigned by the seller to himself, "notify the purchaser," the bill of lading having attached thereto a customer's draft drawn by the seller

quired to charge the defendant as carrier, as we have seen, and as will also appear by reference to the following authorities: 1 Hutchinson on Carriers (Math. & D.) § 152; 10 Corpus Juris, § 251, p. 192, and especially page 193; *Berry v. Railroad Co.*, 122 N. C. 1002, 30 S. E. 14; *Wells v. Railroad Co.*, 51 N. C. 47, 72 Am. Dec. 556; *McRary vs. Railroad Co.*, 174 N. C. 563, 94 S. E. 107. 1 Hutchinson on Carriers, *supra*, says:

"No receipt bill of lading or writing of any kind is required to subject the carrier to the duties and responsibilities of an insurer of the goods. As soon as they are delivered to him for present carriage and nothing necessary to their being forwarded remains to be done by the owner, the law imposes upon him all the risk of their safe custody as well as the duty to carry as directed. He is regarded as exercising in some sort the functions of a public office, and the law is said to impose upon him his duties and obligations upon this ground as well as upon the ground of contract, and as soon as the delivery to him and his acceptance are shown, the law imposes the duty and responsibility in virtue of his public employment. In other words, his liability does not rest exclusively upon contract, however much it may be qualified or limited by express agreement."

"We have held it to be settled law that the relationship of carrier and shipper may be created without any written bill of lading. *Davis v. N. S.*

*Railroad Co.*, 172 N. C. 209, 90 S. E. 123; *Smith v. Railroad Co.*, 163 N. C. 143, 79 S. E. 433. And it is also held with us that in case of an interstate shipment, while a written bill of lading should always be issued, as evidence of the contract between the parties, yet, if the same is omitted, the requisite stipulations of bill or contract, as prescribed by the federal statutes, or valid regulations of the Interstate Commerce Commission, will attach and govern the rights of the parties concerning it. *Railroad v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Peanut Co. v. Railroad Co.*, 166 N. C. 62, 82 S. E. 1; *Bryan v. Railroad Co.*, 174 N. C. 177, 93 S. E. 750; *McRary v. Railroad Co.*, 174 N. C. 563, 94 S. E. 107. This court has held in the *Bryan* case, *supra*, as stated in the second head-note:

"In order to obtain uniformity of carriage contracts for interstate commerce, the Carmack Amendment to the Interstate Commerce Act requires the carrier to issue a bill of lading upon terms fixed by the Interstate Commerce Commission; and while a parol contract of shipment is upheld as binding, the uniform contract yet fixes its terms."

"The only question then is whether the package of goods was shipped, or, in other words, accepted by the carrier for transportation from Charleston to Richlands, and was it lost. There were facts and circumstances which constituted some evidence in

on the purchaser, and sent to a bank for collection, the title does not pass to the purchaser until the draft is paid and the bill of lading surrendered, in the absence of evidence to overcome the presumption that this was the intention.<sup>5</sup> So a bona fide assignment

support of this allegation, and which should have been submitted to the jury with proper instructions from the court. That plaintiff paid the freight charges on his entire order of goods, and that the carrier accepted the same were circumstances tending to show receipt of the goods by the railroad company, for the company had no right to charge for more than it actually received for shipment, and it is not at all probable that it did so, and it offered no evidence itself to the effect that it did so charge. The retention of the claim filed with it for so long a time, without objection to it or denial of it, when it exhibited a detailed statement of the whole transaction, and substantially charged it with having accepted the goods for shipment, was another circumstance to be considered, and there may be others, but it is unnecessary to pursue this discussion further. It must not be inferred that we are even intimating any opinion upon the weight of the evidence, but only stating that there is some evidence upon the issues in the case. Its weight is for the jury to pass upon."

5. *Bennett v. Dickinson* (Kans. 1920), 186 Pac. 1005.

It is a common practice, where a bill of lading provides for delivery to the consignor's order and has gone forward attached to a draft on the purchaser or other person by whom payment is to be made, to give directions that such person be notified on the arrival of the goods in order

that he may pay the draft and procure the goods. The very presence of the word "notify" in such a case shows that the person named is not intended as the consignee, but is simply to be advised on the arrival of the goods. The fact that a bill of lading is made out to the consignor's order to which is attached a draft drawn upon the person to be notified makes this still plainer. *Bennett v. Dickinson* (Kans. 1920), 186 Pac. 1005.

Where a draft accompanied by a bill of lading is deposited as cash and placed to the depositor's credit without any agreement to the contrary, the bank acquires title both under the law of Virginia and under that of Alabama. *Fourth Nat. Bank of Montgomery, Ala., v. Bragg* (Va. 1920), 102 S. E. 649.

Where a bank takes an assignment of a bill of lading and pays the accompanying draft of the shipper for the value of the goods, the bank thereby becomes a bona fide holder, and no attachable interest in the goods or the proceeds remains in the shipper. *Fourth Nat. Bank of Montgomery, Ala., v. Bragg* (Va. 1920), 102 S. E. 649.

A bank which purchases a bill of lading and makes draft on consignee is not liable on any implied warranty of goods nor subject to attachment of proceeds of draft where consignor is insolvent. *Terre Haute Nat. Bank v. Horne-Andrews Commission Co.*, 101 S. E. 6.

Claimant, who was in business at Topeka, contracted to purchase a carload of corn from a shipper at Clayton, Kan., "basis track Clayton buyer's routing." In the letter of confirmation the shipper was directed to bill the car of corn "to us at Shady Bend, Kansas, via Colby and draw on us in the usual manner with papers attached." The shipper followed the instructions, and procured a "shipper's order notify" bill of lading, to which he attached a customer's draft drawn on the purchaser, which was sent through the banks for collection. The corn was damaged in transit. The draft was paid on the day the car reached its destination. Held that, the title not having passed to the purchaser, until the draft was paid, he cannot maintain an action to recover damages to the corn occurring in transit. *Bennett v. Dickinson* (Kans. 1920), 186 Pac. 1005.

In an action against an express company for the value of butter, cheese, and eggs, ordered by the consignee, but lost in transit the rule that delivery to the carrier is delivery to the buyer did not obtain, where it appeared that such was not the intent of the parties to the sales contract, in view of Personal Property Law, Sec. 99, providing that on a contract to sell specified goods the property passes at the time the parties intend that it should; the intent being determined by the circumstances of the case, and there being an implied warranty that the articles shipped were such as were ordered and were wholesome, in view of section 96, subd. 2, the goods not having been previously selected and inspected by the buyer, under section 128, subds. 1 and 2. *Lewis v. American Railway*

*Express Co.*, 180 N. Y. S. 751.

Where a chattel mortgage was registered, it was notice to a railroad shipping the mortgaged goods, as far as the ownership of the goods and the liability for freight were concerned. *Southern Ry. Co. v. W. A. Simpkins Co.* (N. C. 1919), 100 S. E. 418.

In view of nonnegotiability of a straight bill of lading under U. S. Comp. St. §§ 8604aaaa, 8604b, and 8604o, that plaintiff caused the naming of S. as consignee in a straight non-negotiable bill of lading covering interstate shipment of shingles did not give to S. any better title than would an assignment of the bill to S. had plaintiff been named therein as both consignor and consignee. *Getschell v. Northern Pac. Ry. Co.* (Wash. 1920), 187 Pac. 707.

When a contract is made for a sale, there is a presumption that delivery to the carrier is delivery to the buyer, in view of the Personal Property Laws of New York, unless a contrary intent be shown. *Lewis v. American Railway Express Co.*, 180 N. Y. S. 751.

Though plaintiffs who procured for interstate shipment of shingles a straight nonnegotiable bill of lading, delivered the bill to S. under agreement for cash sale of shingles, yet, where payment of check given by S. for the shingles was refused and plaintiffs demanded the shingles from the railway company, the company was, where it refused the demand and thereafter delivered the shingles to assignee of S., liable to plaintiffs for damages resulting from delivery to another. *Getchell v. Northern Pac. Ry. Co.* (Wash. 1920), 187 Pac. 707.

or transfer of a bill of lading vests in the assignee or transferee the title of the shipper to the goods covered by the bill.<sup>6</sup> And a bill of lading is not required to create relationship of carrier and shipper and the rights and duties, measured by the common law, incident thereto.<sup>7</sup>

**Failure of Carrier to Furnish Facilities.** It is the carrier's duty to furnish suitable equipment, and if freight be damaged in consequence of its failure in this particular, it is liable to the shipper therefor.<sup>8</sup> But while railroad companies are bound to furnish suitable cars for their usual and ordinary traffic, they are not liable to furnish such cars in times of car shortage, occasioned by unprecedented and unforeseen demand for such cars, by abnormal prolonged detentions on connecting lines, or other extraordinary causes and circumstances which could not have been foreseen and against which it was in reason impossible to provide.<sup>9</sup> And a railroad company is entitled to reasonable notice when a freight car is ordered.<sup>10</sup>

6. *Fourth Nat. Bank of Montgomery, Ala., v. Bragg* (Va. 1920), 102 S. E. 649.

7. *Aman v. Dover & Southbound R. Co.* (N. C. 1920), 102 S. E. 392.

8. *Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co.* (Wash. 1920), 186 Pac. 852.

Where, in an action for failure to furnish a refrigerator car to receive lettuce, the one ordering the car testified that he also ordered two cars for another, designating the number of cars by raising two fingers and then one, an instruction to find for plaintiff if order was given and "understood" by defendant's agent was not erroneous, in that use of quoted word referred to understanding of terms of order. *Futch v. Atlantic Coast Line R. Co.* (N. C. 1919), 100 S. E. 436.

In an action against a railroad for failure to place a refrigerator car to

receive lettuce, whether a new promise was made, on the day after the first attempt to order the car, to place it by 2:30 p. m., held a question for the jury. *Futch v. Atlantic Coast Line R. Co.* (N. C. 1919), 100 S. E. 436.

9. *Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co.* (Wash. 1920), 186 Pac. 852.

10. *Futch v. Atlantic Coast Line R. Co.* (N. C. 1919), 100 S. E. 436.

Where the rules of a railroad, required and approved by the Interstate Commerce Commission, required a coal company each day to specify the cars it required for the following day, specifying separately those required for shipment of coal to be used by the railroad and to private consignees, railroad has the right to use coal put in cars requisitioned as being necessary for fuel to be used by the railroad, although the manifest card in-

licated that the coal should be shipped to private consignees; there being such a shortage of cars that the coal company would not have received such cars for shipment of coal to private consignees; there being such a shortage of cars that the coal company would not have received such cars for shipment of coal to private consignees. *Phoenix Coal Co. v. Pennsylvania R. Co.*, 180 N. Y. S. 283.

In *Gray v. Oregon Short Line R. Co.* (Idaho 1920), 187 Pac. 541, the court said:

"Appellants alleged that on July 3, 1915, they delivered to respondent 3,058 head of lambs for shipment to Chicago, Ill.: that respondent did not promptly carry and deliver the property, but on the contrary negligently allowed the lambs to remain on board the cars at Hailey, Idaho, where they were loaded, in the hot sun, without food or drink, for a period of 7 hours and 10 minutes, thereby causing them to shrink in value and in weight, to the damage of appellants.

"The court found that after appellant's sheep were loaded, they were held at Hailey until completion of loading 17 cars of sheep belonging to other shippers destined to Chicago over the line of the railroad of respondent and connecting carriers, and that when all sheep destined for Chicago were loaded, they were immediately forwarded and promptly transported to destination, and arrived at the first feeding point and at their final destination as soon and in as good condition as if each consignment had been separately transported and forwarded as soon as the loading thereof was completed. The court also found that there is a normal shrinkage of sheep during transportation, but that there was no evi-

dence that those in question shrunk in transit between the point of origin and point of destination in any amount in excess of the normal shrinkage. No damage is claimed other than that resulting from shrinkage in weight.

"This action is founded on negligence. The general duty which rested upon respondents is stated in the case of *St. L. & S. F. R. Co. v. Zickafoose*, 39 Okl. 302, 135 Pac. 406, as follows:

"It was the duty of the carrier, after the live stock was received and loaded according to agreement, to transport them with all convenient dispatch with such suitable and sufficient means as it was required to provide in its business; that is to say, in a reasonable time."

"What is a reasonable time is a question of fact in each particular case, the determination of which may be affected by the regular train schedules established by the carrying railroad. *Bosley v. B. & O. R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871; *Hickey v. C., B. & Q. R. Co.*, 174 Mo. App. 408, 160 S. W. 24; *Tiller & Smith v. C., B. & Q. R. Co.*, 142 Iowa, 309, 120 N. W. 672; 10 C. J. p. 286, § 407.

"It is not contended in this case, however, that there was unusual delay in reaching the point of destination, but the delay of which complaint is made consisted in holding the stock on the cars at Hailey after loading and before commencement of transportation. As to whether this delay was negligent, or otherwise, must depend upon the circumstances. The court found that the schedule of trains of respondent was such that if the sheep had been immediately moved from Hailey to the next junc-

tion point on the main line of respondent railroad they would not have moved forward from the junction point before the evening of that day. In other words, they would have been delayed at the junction point instead of at Hailey, the point of loading. Under the circumstances, it cannot be said as a matter of law that the delay complained of was negligent.

"If there were doubt on the question of respondent's negligence, there is no doubt of appellants' failure to prove damages as the result of such negligence. The lambs were delivered for transportation to Chicago, but as a matter of fact they were diverted and delivered to the shipper at

Omaha. The burden was upon the appellants to show that on account of being delayed on the cars at Hailey, the lambs weighed less upon their arrival at Omaha than they would have weighed had the delay not occurred. *Richmond, etc., R. Co. v. Trousdale & Sons*, 99 Ala. 389, 13 South. 23, 42 Am. St. Rep. 69; *Smith v. New Haven & N. R. Co.*, 12 Allen (Mass.) 531, 90 Am. Dec. 166; *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489, 90 Am. Dec. 252. The court found that no evidence of abnormal shrinkage was furnished. From an examination of the record, the court was justified in so holding."

## CHAPTER III.

### NEGLIGENCE DURING TRANSPORTATION.

**Circumstances Relieving from Liability. In General.** A carrier is not an insurer of perishable freight, if the damage is caused by it perishing, but is an insurer in all other respects, just as if it were not perishable, as when it is injured in a wreck or fire, or from any other cause not the act of God or the public enemy.<sup>1</sup>

**Defective Appliances.** The fact that a valve and outlet cap on an oil tank car were improperly adjusted by the shipper will not relieve the carrier from liability if its negligence, after discovery of the leakage of oil, contributed to the loss.<sup>2</sup>

1. *Singer v. American Express Co.* (Mo. 1920), 219 S. W. 662.

2. *Southern Cotton Oil Co. v. New Orleans & N. E. R. Co.* (La. 1920), 83 So. 821.

In *Southern Cotton Oil Co. v. New Orleans & N. E. R. Co.* (La. 1920), 83 So. 821, 822, the court said:

"While it is true that Brown, the superintendent of the oil company at Meridian, and his negro assistant have testified that in their opinion the oil was properly loaded by them in this tank and the valve was set and the cap underneath the car was tightly screwed on, we are of the opinion that this testimony is not of such a character as to make it absolutely certain that this was the case. On the contrary, we believe that both of these men, who attended to the loading of the oil into this tank car, were careless at the time of loading, and did

not make absolutely certain that the valve inside the car was tightly set, nor is it our opinion that same was so set, or that the outlet cap was tightly screwed on when this tank car was delivered to the railroad company, and therefore we believe that after the train, of which this tank car formed a part, had been on its journey for some time, and after same had left Barnette, the jolting of the train caused the outlet cap to work off, and, the inside valve not having been properly set when the car was loaded, the oil escaped through the outlet pipe.

"Having, however, reached the conclusion that the tank car at issue was not loaded with that care which would preclude the idea that the valve was properly set when same was turned over to defendant company, the question then presents itself whether or not, after the leak was discovered by

**Live Stock.** Where the shipper of live stock in interstate commerce requested an extension of time of confinement from

the conductor of the train, of which this tank car formed a part, did defendant do all in its power and use that care which as a common carrier it is compelled to exercise in order to stop the flow of oil and thereby prevent the waste of the valuable freight, of which at that time it had entire control and supervision, so as to relieve it of all liability.

"This point, as well as all others, has been ably argued, both orally and in briefs filed by counsel for plaintiffs and defendant, but a careful examination of the many authorities relied upon by counsel for defendant does not convince us that, even though the goods were improperly packed by the consignors and delivered to the railroad company in that condition, that fact alone will relieve them from liability as common carriers if after discovering the leakage the carrier's negligence was of such a character as to have contributed to the damage complained of.

"The law in this connection has been frequently expressed, and we quote from *Corpus Juris*, vol. 10, p. 125:

"When the carrier relies on one of the exceptions to his common-law liability, it must appear, in order to excuse him, that the exceptional cause, such as an act of God, or the like, was the immediate or proximate, and not the remote, cause of the loss. And whilst it must be true as a general proposition that, although the carrier is in some way negligent, if such negligence does not contribute to the loss which is due to an excepted cause the carrier is not liable, it is very generally declared that, if the

negligence of the carrier concurs with an act of God in producing a loss or injury, the carrier is not exempt from liability by showing that the immediate cause was the act of God, or other accepted cause. A carrier is responsible where a loss is caused by act of God or excepted cause if the carrier's negligence mingles with it as an active and co-operative cause."

"It is clear that if the carrier might by reasonable care or foresight have avoided loss by act of God or other excepted cause he will be liable. The duty also rests upon him, as far as possible, to avoid or lessen the damage resulting from such cause, and negligence in not doing so will render him liable." 6 Cyc. 384. *Union Express Co. v. Graham*, 26 Ohio St. 595; *Gulf Coast Transfer Co. v. Howell et al.*, 70 Fla. 544, 70 South. 567, L. R. A. 1916D, 974; *Jonesboro L. G. & E. R. Co. v. Dunavant*, 117 Ark. 451, 174 S. W. 1187.

"This question is not a new one in this state, the liability of carriers having been fixed by our Code and determined by this Court. R. C. C. are 2754; *National Rice Milling Co. v. N. O. & N. E. R. R. Co.*, 132 La. 615, 61 South. 708, Ann. Cas. 1914D, 1099; *Lehman Stern & Co. v. M. L. & T. R. R. & S. S. Co.*, 115 La. 1, 38 South. 873, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818; *Darrall v. S. P. Co.*, 47 La. 1456, 17 South. 884. We do not think that the rule set out in *Sedgwick on Damages* (9th Ed.) p. 415, quoted in the second supplemental memorandum by counsel for the railroad company, has any force or application in so far as this case is concerned.

28 to 36 hours, and the carrier agreed, a lawful contract resulted which gave rise to a cause of action in the shipper if violated by

"A careful study of the testimony in this case as shown by the record fails to convince us that at the time the leak was discovered by the employees of the defendant company it required any special degree of skill on their part to have unscrewed the dome cap at the top of this car, and, having done so, to set the valve in a very few minutes, thereby saving all the oil which was left in the tank.

"The conductor of the train testified that the tank car was in apparent good condition until after the train left Barnette, and up to that time he had discovered no traces of any oil escaping from the outlet pipe, and it was not until the train was nearing the Vossburg railroad station, that from a pungent odor which pervaded the caboose he found traces of oil upon the railroad tracks. He then signalled the engineer to bring the train to a stop, which was done within three minutes of the time when he made the discovery that the oil was leaking, the train then being close to the Vossburg station. That in company with the engineer and other members of the crew, with the exception of the fireman, who was left in charge of the engine, they ascertained the cause of the leak, and endeavored to stop same, first by attempting to screw on the cap of the outlet pipe underneath the car, by trying to affix a plank to the bottom of that pipe, and, being unsuccessful in these attempts, then attempted to unscrew the dome cap on top of the car and set the valve inside of same.

"An examination of the model of the tank car, placed in evidence by defendant company, taken in connection

with the testimony of the various witnesses who testified as to the method of unscrewing this dome cap and setting the valve, does not convince us that the crew of this train, amongst whom was an experienced engineer and mechanic, took the proper steps to stop this flow of oil, particularly as it appears to us that even a casual examination of the car would have shown them what ought to have been done in this connection.

"It seems that if the engineer of the train, who stated that after mounting on top of the car he endeavored to unscrew the dome cap by applying an 18-inch monkey wrench to one of the lugs permanently attached and forming part of that cap, and in that way endeavored to unscrew same, had examined the cap in question, it must have been apparent to him that that was not the proper method to follow, and, as shown by the evidence, there was in his possession, as part of the tools carried on this train, an iron pick; that by inserting the handle of this pick between the lugs on the dome cap, and, by the exertion of very little force in the right direction, have unscrewed this dome cap and set the valve, thereby saving the oil remaining in the tank.

"Even if the engineer, who had been for a great many years in the employ of this railroad company in that capacity, and who must have been a trained mechanic (and therefore in our opinion ought to have known how to unscrew a cap of this character), did not possess that knowledge, there was a member of the crew present at the time of the accident who by his own testimony shows that he had

the carrier, with resulting damages through unloading the cattle too early at disease-infected yards midway in the transit.<sup>3</sup>

**Delay.** The general duty resting upon a carrier of live stock, when received and loaded according to agreement, is to transport the shipment with all convenient dispatch, and with such suitable and sufficient means as it is required to provide in its

seen a car of this character opened. and had looked inside of same (record, page 116) and therefore knew, or most certainly ought to have known, what to do in this emergency. Yet this man stands by, and not only makes no attempt himself to unscrew the dome cap in the way he had seen it done, but offers no suggestion to the engineer during the entire time that he and the other members of the crew were attempting to do what ought to have appealed to this servant of the railroad company as a vain thing in stopping the flow of this oil.

"In the face of this testimony, we cannot hold that the officials of this company (the railroad), whose duty it was to have prevented the waste of this valuable freight intrusted to its care as soon as the leak was discovered by them, and which in our opinion required the exercise of no special skill on their part to have accomplished, particularly when we take into consideration the fact that the car in question was solely in defendant's custody and supervision at the time the leak was discovered, had a right to cut this car out of the train, sidetrack it, and allow its entire contents to leak away, relying solely on the fact that the car in question was the property of the consignors and had been badly loaded by them, thereby escaping liability of what in our opinion was defendant's negligence and want of care, and which negligence

was the proximate cause of the damage suffered by the plaintiffs in this case.

"For the reasons herein assigned it is ordered, adjudged, and decreed that the judgment of the lower court be now avoided, annulled, and reversed, and that there be judgment in favor of plaintiffs, the Southern Cotton Oil Company, and against the defendants, the New Orleans & Northeastern Railroad Company, in the sum of \$3,594.70, with legal interest thereon from the 15th day of October, 1913, until paid, defendants to pay costs of both courts."

3. *Bradford v. McAdoo* (Mo. 1920), 219 S. W. 92.

Under U. S. Comp. St. § 8651, providing that on written request of the owner of live stock shipped in interstate commerce the time of its confinement on cars may be extended from 28 to 36 hours, where a shipper, to escape contagion at a point en route, desired more time for transit without unloading than 28 hours, by giving his written request for extension of time to 36 hours he became entitled to such extension as would cause unloading not earlier than some time between 28 and 36 hours. *Bradford v. McAdoo* (Mo. 1920), 219 S. W. 92.

In an action against the federal Director General of Railroads for damage to live stock in transit, where

business; that is to say, within a reasonable time.<sup>4</sup> What is a reasonable time within which a shipment of live stock must be transported by a carrier to its destination is a question of fact in each case, the determination of which may be affected by the regular train schedules established by the carrying railroad.<sup>5</sup> If goods transported within a reasonable time would ordinarily arrive in good condition, and the additional length of time caused by the negligence of the carrier in itself would cause damage to the goods, the delay in transportation would constitute a proximate cause of the damage.<sup>6</sup>

**Loss by Fire.** In an action against a carrier for loss of baled cotton by fire the claimant had the burden of showing the amount of his damage, which was not discharged by evidence failing to show the grade of the cotton or number of pounds destroyed.<sup>7</sup>

**Freezing.** Where the filed and published tariff of an interstate carrier gave a shipper of fruit the option of shipping the same at his own risk of freezing, or at the carrier's risk under an increased rate, the carrier, not having a refrigerator car, on account of an unaccountable shortage, held not required to make a shipment in an ordinary box car at its own risk, notwithstanding a clause in a supplement to the tariff defining "perishable freight" to include "any article requiring protection from cold, either by use of refrigerator or other insulated car, by artificial heat, or by both," etc.<sup>8</sup> And where a tariff of a

plaintiff did not prove the allegation, on which he based recovery, that the expression in the contract of shipment, "36-hour release" had a well-known, usual, and customary meaning, which meaning was the basis of his claimed cause of action, judgment for him cannot stand. *Bradford v. McAdoo* (Mo. 1920), 219 S. W. 92.

4. *Gray v. Oregon Short Line R. Co.* (Idaho 1920), 187 Pac. 540.

5. *Gray v. Oregon Short Line R. Co.* (Idaho 1920), 187 Pac. 540.

6. *Reznek v. Southern Pac. Co.*, 181 N. Y. S. 117.

7. *Brass v. Texarkana & Ft. Smith Ry. Co.* (Tex. 1920), 218 S. W. 1040.

8. *Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co.* (Wash. 1920), 186 Pac. 852.

In *Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co.* (Wash. 1920), 186 Pac. 852, the court said, p. 853:

"The amended complaint alleges in effect that appellant is a corporation engaged in the fruit and produce

carrier provided for two kinds of service in the shipment of perishables, under which the shipper could assume responsibility

business at Yakima, Wash., and on December 4, 1916, delivered to the respondent, a common carrier, at Yakima, Wash., a carload of apples to be transported to Wichita, Kans.; that at the time of delivery respondent had in effect, governing such shipments, a tariff which provided for two kinds of service, and for which different charges were made; that one kind of service was known as "option 1," and was upon condition that the shipper assume responsibility for loss or damage occasioned by frost, freezing, or overheating, and the other kind was known as "option 2," which provided that the carrier assumed the responsibility for loss or damage occasioned by frost, freezing or overheating; that the charge for option 2 service was \$24 in excess of the other kind, between the places mentioned; that at the time of delivering the carload of apples appellant demanded that it be permitted to enter into option 2 contract, which it was ready, willing, and able to perform, but that respondent refused to enter into such contract and refused to transport the shipment under any contract other than option 1, which appellant was compelled to, and did, accept; that respondent, disregarding its duty as a common carrier and knowing the perishability of the shipment, refused to furnish a suitable car for the service required, and that respondent knew the car provided was unsuitable for safely carrying the apples in the event there was severe cold weather and freezing temperature to which the apples would be subjected; that in the course of transportation the apples were frost-

bitten and frozen, causing the damages complained of in this action; that a claim for the amount of the damages was presented to the respondent, which refused to pay the same or any part thereof.

"In the first affirmative defense—the only one we deem it necessary to consider—the respondent alleged, in effect, that it is a common carrier engaged in interstate commerce; that at the date of receiving the shipment in question, and at all times since November 8, 1915, it had in effect a tariff providing for two kinds of service for the transportation of perishable freight, one called option 1, and the other option 2; that under the terms of option 1 contract the shipper assumes liability for loss due to frost or freezing, but, if in the shipper's judgment it is necessary to use lining, false flooring, or to install stoves, he might do so at his own expense, provide fuel (being allowed a deduction from the weight of the car to offset the weight of such equipment), and a caretaker would be transported by the carrier to take care of the shipment, and the caretaker and stove would be returned free of charge; that under the terms of option 2 contract the carrier assumes liability for loss due to frost or freezing, but in such case there is a charge over that made for service under option 1 contract; that under its published tariff it could lawfully transport the apples only under one or the other of said two contracts; that, where the shipper desired to ship under option 2, it was the duty of respondent to provide a refrigerator car, which was the only car con-

for damages occasioned by frost, or, by paying an increased rate, could require the carrier to assume the responsibility, it was

structured so that apples could be safely transported in transcontinental movement in the month of December, and the only kind of car in which apples could be moved, or ever have been moved, under option 2 contract—which fact was well known to both parties at all times—and that respondent never had undertaken the responsibility entailed by option 2 contract, except for shipments moving in refrigerator cars; that prior to December, 1916, it had made ample provision for moving the apple crop of the Yakima country, and at that time it owned enough refrigerator cars to answer all demands it could or did reasonably anticipate, and except for an unavoidable shortage of them would have been able to furnish one to appellant for its shipment; that in the month of September, 1916, there was a heavy east-bound movement of soft fruits and other perishable freight from Yakima, that required refrigerator cars furnished by respondent for the safe transportation of such fruit destined to points beyond its line; that it was unsafe and impracticable to transfer such freight to the cars of connecting carriers, and in addition respondent was a party to duly published through joint rates that necessitated its refrigerator cars going through to destination, and further that the connecting carriers did not have refrigerator cars into which the fruit could have been transferred; that in prior years its refrigerator cars had always been returned in ample time to remove the Yakima apple crop during the usual shipping period from October to the following January, but in December, 1916, its

supply of refrigerator cars was for the first time detained by connecting carriers, and, although respondent made every effort to get them returned (including necessary applications to the Interstate Commerce Commission as shown by its car-supply investigation decision reported in 42 Intersta. Com. Com'n R. 657, made a part of the answer), it was unable to do so, and that on or about December 4, 1916, there were so detained 2,333 of its refrigerator cars; that in the fall and as late as December, 1916, there was an unusual demand for refrigerator cars to transport apples, potatoes, and other perishable goods, because never before had there been any considerable movement East of potatoes from the Yakima section; but in that year, due to the failure of the potato crop of the Middle West and elsewhere, there was a heavy east-bound movement, from Yakima and vicinity, requiring the use of 1,000 refrigerator cars, which respondent was compelled to supply, all of which would otherwise have been available for moving the apple crop that fall and winter, as respondent had reasonably expected; that according to its custom respondent made diligent investigation in advance that year, to ascertain the size of the apple crop, but that withal the crop greatly exceeded its estimate, and that, because of the lateness of the season and delay in picking and packing, the apple crop was offered for shipment so much later than theretofore as to cause such an unprecedented accumulation of the crop and demand for refrigerator cars for shipment between November

primarily the duty of the carrier to accept the shipment under its ordinary common-law liability expressed in the second option,

15th and December 15th that respondent, notwithstanding its care and precautions, but because of its unavoidable shortage of cars, was unable to furnish refrigerator cars for the movement in one month of a volume of such business that had always extended over a period of six weeks or two months; that because of such situation, and without any fault of respondent, it could not promptly furnish a refrigerator car to appellant under option 2 contract, but that, as it was legally bound to do, it offered to furnish a box car for the transportation of apples under option 1 contract, whereupon appellant elected to use a box car and entered into option 1 contract, and so shipped its apples, and appellant undertook to properly prepare said cars to contain apples, and installed a stove and sent a caretaker in charge, well understanding respondent's inability to supply a refrigerator car at that time, and well knowing that a box car was not suitable for the transportation of apples on such a trip at that time, and with full knowledge of such facts shipped its apples under option 1 contract, paid the rate of freight provided for such shipments, prepared the car as it saw fit, and assumed all risk of loss or damage to the shipment from frost, freezing, and overheating as provided by the contract; and that, if said apples were damaged by frost and freezing, as alleged, it was due to a risk assumed by appellant and to the negligence of appellant in failing to properly floor, line, and prepare said car, and to the carelessness of appellant's agent in charge of the shipment in failing to

give it the necessary care and attention.

"Primarily it was the duty of respondent to accept the shipment under its ordinary common-law liability for any injury or damage thereto in transit expressed in option 2 contract, which was the service requested by the appellant. Further, it is a carrier's duty to furnish suitable equipment, and if freight be damaged in consequence of its failure in this particular it is liable to the shipper therefor. Applying these well-settled principles, it is clear a cause of action is stated in the amended complaint; for respondent not only refused to enter into a contract by the terms of which it would become liable for damages, according to the common law, its tariff, and the acts of Congress regulating interstate commerce, but it also refused to furnish a car which would protect the shipment from such damage.

"The only question, therefore, is: Does the affirmative defense state facts sufficient to save respondent from the liability shown in the amended complaint? A carrier in interstate commerce can enter into no contract of transportation for which there is not express authority in its filed and published tariffs. *T. & P. R. Co. v. American Tie Co.*, 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255.

"The duly filed and published tariff applicable in this case provided two kinds of service for moving perishable freight, such as apples, at the choice of the shipper—the one under option 1 contract, at the risk of the shipper; the other under option 2 contract, at the carrier's risk. It is

alleged in the answer that the refrigerator car was the only car constructed so that apples could be safely transported between the points mentioned in the month of December, and the only kind of a car in which apples could be moved, or ever have been moved, under the terms of option 2 contract, which fact was well known to appellant. It is further alleged that, prior to December, 1916, respondent had made ample provision for moving the apple crop of the Yakima section, and at that time owned refrigerator cars sufficient to respond to all demands it could, or did reasonably anticipate, and was prevented from supplying one to appellant only because of an unlooked-for, unusual, and unavoidable car shortage, together with an irregular harvesting and congested shipping conditions of the apple crop. All of these facts, set out in detail, are, of course, admitted by the demurrer. As shown by the report of the Interstate Commerce Commission in its car-supply investigation ending in December, 1916:

"The present conditions of car distribution throughout the United States have no parallel in our history." 42 Interst. Com. Com'n R. 657.

"That investigation was in part at the instance of this respondent, which at that time, as alleged in its affirmative defense, was suffering from a shortage of 2,333 refrigerator cars. It seems to be the well-settled rule that, while railroad companies are bound to furnish suitable cars for their usual and ordinary traffic, they are not liable for failure to furnish such cars in times of car shortage occasioned by unprecedented and unforeseen demand for such cars, by abnormal prolonged car detentions on

connecting lines, or other extraordinary causes and circumstances which could not have been foreseen and against which it was in reason impossible to provide. *P. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; *H. & T. C. R. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772; *L. C. C. v. I. C. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; 4 R. C. L. § 150, p. 674; 10 C. J. § 67, p. 73. Abundant facts are alleged in the answer to bring the respondent within the rule of exemption from liability for its failure to supply appellant with a refrigerator car—the only kind of car suitable for the service under option 2 contract—on December 4, 1916.

"Calling attention to a portion of supplement No. 7 to the tariff, which is as follows:

"1. (a) Under the provisions of this section of tariff the term "perishable freight" will include:

"Any article requiring protection from cold, either by use of refrigerator or other insulated cars, by artificial heat, or by both, including \* \* \* Fruits, fresh \* \* \*

—appellant argues that, because it speaks of the use of refrigerator or other insulated cars, by artificial heat, or both, it so modifies or controls the general tariff as to compel the common-law liability of the carrier, regardless of cars, so that, in the event respondent was unable to supply a refrigerator car, it nevertheless was bound to make the shipment in a box car at its own risk. The argument is not justified. The whole of supplement 7, as set out in the pleadings, shows it still preserves the rights and obligations of the shipper and carrier under the two kinds of contracts, option 1 and option 2, as to that feature

when such service was requested by the shipper.<sup>9</sup> The heating of a car for the transportation of potatoes and the furnishing of an attendant are special facilities not common to the act of transportation, and cannot be furnished, in the absence of provision therefor in the posted and published rates approved by Interstate Commerce Commission.<sup>10</sup> A carrier is not liable for

involved in this controversy, and besides the language quoted and relied on by appellant shows upon its face it is intended to enumerate what shall be included in the term 'perishable freight,' and is easily separable from the subject-matter of the terms of the contracts with reference to the manner in which such freight shall be transported."

9. *Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co.* (Wash. 1920), 186 Pac. 852.

Where the posted and published tariff rates of railroad made no provision for heating the car, an agreement by the railroad to heat the car for transportation of potatoes would have been illegal, as an agreement to furnish special and discriminatory service, under Interstate Commerce Act, notwithstanding the Cummins Amendment of 1915, making interstate carriers liable for loss, damage, or injury to property caused by such carrier on connecting carrier, despite limitation of liability; such amendment not affecting the requirement that the loss, to render carrier liable, shall have been caused by the carrier. *Clemons Produce Co. v. Denver & R. G. R. R.* (Mo. 1920), 219 S. W. 660.

10. *Clemons Produce Co. v. Denver & R. G. R. R.* (Mo. 1920), 219 S. W. 660.

In *Clemons Produce Co. v. Denver & R. G. R. R.* (Mo. 1920), 219 S. W. 660, the court said:

"About the middle of January, 1917, plaintiff shipped a carload of potatoes over defendant's railroad from Chocora, Colo., to Pueblo, in the same state. The car arrived in Pueblo, but was allowed to remain there by plaintiff more than two days, when it was diverted by his order over other roads to Kansas City, Mo., and then again diverted to Solomon, Kan., where it was found a large part of the potatoes were frozen, whereupon plaintiff brought this action for damages. The judgment in the trial court was for defendant.

"The case was heard by the court on an agreed statement of facts without the aid of a jury. It appears that the weather was very cold, and that defendant furnished plaintiff with a refrigerator car, 'well papered and heavily strawed,' and that plaintiff placed a stove therein during the three days of loading (January 11th, 12th, and 13th), which he (plaintiff) kept fired, but removed immediately after the loading was completed and bill of lading signed. No instructions were given defendant as to the care to be taken of the shipment, except those contained in the bill of lading.

"At the time of this shipment tariff rates were filed with the Interstate Commerce Commission, known to plaintiff, in which no provision is made for heating the car, but, on the contrary, containing provisions or rules by which it appeared that:

"Ratings provided for freight in

loss through freezing of perishable freight, unless he was negligent; but the burden is upon the carrier to show itself not

carloads do not obligate the carrier to furnish heated cars, nor to maintain heat in cars, for freight requiring such protection, except under conditions which the carrier's tariffs provide.'

"Stoves, used in cars, and the fittings and fuel therefor, must be furnished by shipper, and the fuel must consist of coal, coke, or charcoal, unless otherwise permitted by regulations of individual carriers.'

"The bill of lading incorporated the tariffs as a part of its provisions. It was agreed that the potatoes would not have frozen had a stove been kept in the car heated during transportation. It was further agreed that there was no negligence on the part of either of the carriers during the transportation—

"the plaintiff contending and the defendant denying that the defendant is an insurer to such an extent as makes it liable for the freezing of the potatoes during transit, notwithstanding absence of negligence.'

"Since defendant's posted and published tariff rates made no provision for heating the car, it would have been a violation of the law for it to have agreed to such special service; it would have been furnishing special and discriminatory service to plaintiff in the face of the federal statute. *Railroads v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Cleveland & St. L. Ry. v. Dettlebach*, 239 U. S. 588, 594, 36 Sup. Ct. 177, 60 L. Ed. 453. Furthermore, such services as furnishing a heating stove and attendant are special facilities not common to the act of transportation, and what the Supreme

Court of the United States has called "administrative," belonging to the Interstate Commission exclusively. *A., T. & S. F. Ry. v. United States*, 232 U. S. 199, 34 Sup. Ct. 291, 58 L. Ed. 568; *Loomis v. Lehigh Valley R. R.*, 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517.

"But in avoidance of the foregoing considerations plaintiff cites a change in the Interstate Commerce statute known as the Cummins Amendment, adopted in 1915, since the foregoing cases were decided (section 8604a, U. S. Compiled Stat.), wherein it is declared that an interstate carrier shall be liable to the lawful holder of the bill of lading 'for the full actual loss, damage or injury to such property caused by it,' or other carrier to whom it may be delivered, 'notwithstanding any limitation of liability, or limitation of the amount of recovery or representation or agreement as to value' contained in the bill of lading, contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission, 'and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void.'

"It will be observed, by comparison of the statute before and after amendment, that there was no change made in the requirement that the loss shall have been *caused by the carrier*. So that, notwithstanding the full loss is to be paid, regardless of tariff rates or provision in the contract to the contrary, yet such loss must have been a loss for which the carrier would have been liable at common law, and must have been caused by

the carrier. The amendment did not affect the causes which would put liability for loss on the carrier; it only prevented a contract reducing totally or partially the amount of a loss for which the carrier was liable under the ordinary rules of law. In *Adams Express Co. v. Croninger*, 226 U. S. 491, 506, 33 Sup. Ct. 148, 153, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, the Supreme Court of the United States said:

"The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage' would be to ignore the qualifying words 'caused by it.' The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common-law duty as a common carrier."

"That case was approved in *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265. The Cummins Amendment did not affect the statute as to what should cause the loss. It must be a loss caused by the carrier, since the amendment, as well as before, and those cases, on the point we are considering, are as applicable since as before that amendment. We are thus brought to the question whether the loss occasioned by the freezing of the potatoes in transit is a loss caused by defendant in the sense of the law. The

cold weather was extreme. It appears from the agreed statement of facts that potatoes standing still in a refrigerator car for 24 hours in zero weather will freeze, and that between the time of receiving the potatoes from plaintiff at Pueblo and their final arrival (by plaintiff's diversion orders) at Scammon, Kan., the temperature reached 11 degrees below zero. Freezing in "extreme" cold weather (by which we understand unusual and extraordinary weather) was said to be an act of God, for which a carrier is not liable, unless his negligence mingled with that act, in which case the negligence would be considered the proximate cause. *Wolf v. Express Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Vail v. Railroad*, 63 Mo. 230; *Swetland v. Railway*, 102 Mass. 276.

"Furthermore, even though a freeze in extreme cold weather should not be considered an act of God, as in *McGraw v. Railroad*, 18 W. Va. 361, 41 Am. Rep. 696, yet, as held in that and many other cases, if the loss occurs through the perishable character of the freight, ~~unmingled with the~~ carrier's negligence, it is not his act, and he should not be held liable, though the burden would be on him to show that fact. *Fish v. Railroad*, 98 Misc. Rep. 662, 163 N. Y. Supp. 439; *Schwartz v. Railroad*, 128 Ky. 22, 106 S. W. 1188, 15 L. R. A. (N. S.) 801; *Michellod v. Navigation Co.*, 86 Or. 329, 335, 168 Pac. 620; *Moore on Carriers*, § 10, pp. 336, 337; 10 *Corpus Juris*, 122; *McGovern v. Railroad*, 165 Wis. 525, 162 N. W. 668. In the *Schwartz Case* it is said:

"It is insisted for them that a carrier, in the transportation of perishable articles [apples], is responsible for damages accruing, and that any

negligent.<sup>11</sup> So if a fall of temperature was so unusual that the carrier could not be expected to have foreseen or guarded against it, the destruction of wine as the result thereof was an inevitable accident or act of God, for which the carrier cannot be held liable, but otherwise where the carrier should have foreseen that the wine might be exposed to cold sufficient to freeze it, and should have guarded against this contingency; the destruction of the wine in such case not being due to an act of God, but to

damage resulting from a negligent act cannot be justified by custom or usage. Where the injury to the goods is due to their own inherent nature and from natural causes, such as freezing, without fault on the part of the carrier, he is not responsible. 6 Cyc. 381; *Wolf v. Express*, 43 Mo. 421, 97 Am. Dec. 406; *McGraw v. Railroad Co.*, 18 W. Va. 361, 41 Am. Rep. 696; 5 *Thompson on Negligence*, § 6456. The carrier is also not responsible for any injury which is due to the negligence of the shipper, 6 Cyc. 379. The defense presented in the answer is not that a negligent act of the carrier may be justified by custom or usage. The defense is that the carrier was not negligent.'

"Plaintiff has called our attention to a number of cases not in point, though others are contrary to those we have cited. But as said by the Supreme Court of the United States in *Railway v. Rankin*, 241 U. S. 319, 326, 36 Sup. Ct. 555, 558, 60 L. Ed. 1022, L. R. A. 1917A, 265:

"The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading, and common-law rule as accepted and applied in the federal tribunals.'

"And we find those tribunals are in accord with the rule we have approved. *The Prussia* (D. C.) 88 Fed.

531, 533; *Nelson v. Woodruff*, 66 U. S. (1 Black) 156, 17 L. Ed. 97. But it is stipulated in the agreed statement of facts that neither defendant nor either of the connecting carriers was guilty of negligence. It would therefore clearly appear to follow that the loss was not caused by defendant, and there is no liability. Hence the trial court properly so declared.

"We have already seen that defendant not only did not offer special facilities to prevent the potatoes from freezing, but expressly stipulated that, if a stove was used in the car, it, the fuel, and attendant should be furnished by plaintiff. He, of course, knew the character of freight he was shipping at the time he delivered it. He knew its liability to injury by extreme cold weather, and he chose to assume the risk of all such injury as did not result from defendant's negligence.

"Mention has been made of *Cudahy Packing Co. v. Railroad*, 193 Mo. App. 572, 187 S. W. 149, and *Dean v. Railroad*, 148 Mo. App. 428, 128 S. W. 10. Neither is applicable. Whatever inference may be drawn from the former is against the position taken by the plaintiff.

"The judgment is affirmed."

11. *Clemons Produce Co. v. Denver & R. G. R. R.* (Mo. 1920), 219 S. W. 660.

the carrier's negligence.<sup>12</sup> Where wine was frozen by reason of an unprecedented fall in temperature, which the carrier could not reasonably have been expected to foresee, not as the result of long exposure, but by reason of its arrival at destination while the weather was at or below zero, and where it would have sustained the same damage if it had been delivered on time, the railroad was not liable; the damage having been caused by an act of God, and the railroad's negligent delay in transporting not having been a proximate cause contributing thereto.<sup>13</sup>

12. *Rezsek v. Southern Pac. Co.*  
181 N. Y. S. 117.

13. *Rezsek v. Southern Pac. Co.*,  
181 N. Y. S. 117.

In *Rezsek v. Southern Pac. Co.*,  
181 N. Y. C. 117, the court said, p.  
118:

"The plaintiff herein shipped on the 24th day of November, 1917, 61 barrels of wine to New York from Colma, Cal. They were delivered to the plaintiff at New York on the 2d day of January, 1918. The wine was frozen, and as a result eighteen barrels were burst, and the alcoholic content of the wine in these barrels had apparently leaked out, rendering the wine valueless. The plaintiff thereupon brought this action, alleging in his complaint that the defendant unreasonably delayed the transportation of the wine, and as a result of such delay the wine became valueless. It was shown at the trial that wine freezes when the temperature falls to zero or below, and that at the time the wine arrived in New York the temperature ranged for several days from 13° below zero to 7° below zero, the lowest temperature in New York since accurate records have been kept. There was also proof that ordinarily the freezing of

wine does not injure its quality, unless the alcoholic content of the wine, which by such freezing is driven to the center of the frozen mass, is permitted to escape from the cask before the whole mass of the wine is melted.

"The defendant presented some evidence to show that at the time the wine was shipped, owing to war conditions, there was inevitable delay in the transportation of all goods which were not essential to the conduct of the war, and which were not given priority in transportation, and I have grave doubts as to whether this evidence was not sufficient to show that there was no unreasonable delay in the transportation of the wine: but in my view of the case this question need not be considered, because the delay, even if negligent, is not the proximate cause of the injury to the wine. Since the shipment was an interstate shipment, the courts of this state are bound by the federal decisions in regard to the burden of proof of negligence and whether the negligence of the carrier, if established, constitutes the proximate cause of the damage. Under these decisions:

"Where the carrier shows that the loss was occasioned by the act of

**Rough Handling.** An interstate express carrier is liable for the death of a dog shipped in a crate, resulting from disobedience of the shipping instructions to exercise it once a day ; the instruc-

God he has done all that is required. If the shipper then claims that the carrier's negligence also directly contributed to the injury, he must show that fact.' See *Barnet v. N. Y. Central & Hudson River Railroad Co.*, 222 N. Y. 195, 118 N. E. 625.

"If the wine in the present case was frozen by reason of an unprecedented fall in the temperature which the carrier could not reasonably be expected to foresee, it is quite evident that the damage occurred through an act of God, and no delay on the part of the carrier, even if negligent, contributed to this damage. The destruction of the wine by freezing through the act of God differs logically in no respect from the destruction of goods through a flood by act of God, and in the case of *Hadba v. Baltimore & Ohio Railroad Co.*, 183 App. Div. 557, 170 N. Y. Supp. 770, the court stated:

"If the goods were lost or damaged by flood while en route, the defendant would not be liable, even though the goods would not have been affected by the flood if the carrier had not been negligent with respect to transporting them; and in such case it has been authoritatively held that the flood, which was the act of God, and not the negligence of the carrier, is the proximate cause of the loss or damage.'

"It is contended, however, that in view of the evidence that wine freezes whenever the temperature falls below zero, since such temperature is not so unusual that a carrier could not reasonably be expected to fore-

see it, the destruction of the wine should not be held to be an act of God. Even if that were true, the delay in transporting the wine, which is the only ground of negligence urged in this case, would still not be the proximate cause of the damage. The delay in transportation would constitute under the authorities a proximate cause of the damage, where goods transported within a reasonable time would ordinarily arrive in good condition, and the additional length of time caused by the negligence of the carrier in itself would cause damage to the goods. Such cases, of course, are frequent where perishable goods are transported during the heat of summer, and occur occasionally in transportation for short distances in the cold of winter. In the case of this wine, however, it would appear that the freezing was due, not to any long exposure to the cold, but to the fact that it arrived in New York while the weather was at zero or below. It would have sustained the same damage if it had been delivered to the carrier in California 21 days before arrival in New York.

"Except for the delay of the carrier, the goods might not have been in that place at the time when the weather became cold enough to freeze the wine; but under the federal decisions such delay has been authoritatively held not to be a proximate cause of destruction, when the goods are destroyed by a natural phenomenon, which could not be foreseen or guarded against, and I can see no possible distinction which would make

tion not calling for a special service forbidden by Interstate Commerce Commission rules, and the duty to render a service necessary to the proper care of live stock in transit and to follow shipping directions not being affected by the inability of the carrier to make a charge for a service unless provided for in published tariffs and classifications.<sup>14</sup>

it a proximate cause for the destruction of the goods through a natural cause, which, though perhaps not legally unusual, would have had exactly the same effect if the wine had been in the same place though transported with all possible speed. The fall in temperature was a natural phenomenon which the carrier could not prevent or control. If this fall of temperature was so unusual that the carrier could not be expected to foresee or guard against it, the destruction of the wine was an "inevitable accident" or "act of God," for which the carrier cannot be held liable; if the carrier should have foreseen that the wine might be exposed to cold sufficient to freeze it, and should have guarded against this contingency, then the destruction of the wine was not due to an act of God, but to the carrier's negligence. The negligence of the carrier would, however, even in such event, consist, not in the delay in transportation, which was only a remote cause of the freezing, but in the transportation of the wine without proper safeguards against a change in temperature, which it should have foreseen.

"The plaintiff, however, does not in his complaint, at the trial or on this appeal, urge that the defendant was negligent, except through delay. The complaint is based upon delay in transportation beyond a reasonable time, and the plaintiff's attorney in his brief concedes that the defen-

dant would have been absolved from liability, "had the freezing occurred while the shipment was being transported within a reasonable time, and in that case the defendant could not be liable, as it would have done all the contract of carriage required of it." It is not claimed that the defendant was required to place this wine in a heated car, or to cover it, and if a reasonably prudent man should have foreseen the danger that the wine might freeze, then it would seem that the damage was caused rather by the negligent act of the shipper in delivering wine in casks which would not withstand the effects of the cold to which they would naturally be subjected than by any neglect of the carrier. Since the wine was frozen by a cause which it is not claimed the defendant could control, and the only negligence claimed is that the defendant unreasonably delayed the transportation of the wine, and since under the authority of the decisions of the federal courts this delay was not the proximate cause of the freezing, we are bound to hold that the carrier is not liable.

"Judgment should be reversed, with \$30 costs to appellant, and complaint dismissed. All concur."

14. *Southern Express Co. v. McClellan* (Colo. 1919), 185 Pac. 347.

In *Southern Express Co. v. McClellan* (Colo. 1919), 185 Pac. 347, the court said:

"This is an action, instituted in a justice court without pleadings, wherein the plaintiff seeks to recover damages against the defendant, a common carrier, for the loss of a dog which had been delivered to the defendant for transportation. The cause was appealed to, and tried in, the county court, where a judgment was rendered in favor of the plaintiff. The defendant brings error.

"The ultimate question presented for our determination, upon this review, is whether or not there is sufficient evidence under which the defendant may be held liable for the loss of the animal in question.

"The defendant is an interstate express carrier. An agent of the plaintiff delivered the dog, in a crate, to the defendant at St. George, S. C., on April 16, 1917, for carriage to Denver, Colo. Posted on the crate was a "Notice to messengers," in which the following instruction appeared. 'Exercise at least once each day while en route.' On April 19, 1917, while still in transit, the dog died. A witness for the defendant testified that—

"The dog died of acute peritonitis caused by ruptured bladder due to retention of urine account dog being house-broke would not void in crate.'

"The evidence fairly shows that the instruction on the crate was not at any time complied with by the carrier, and that at no time was the dog taken out of the crate. There is evidence supporting the conclusion that the dog's death would not have occurred if the instruction had been complied with; that the dog would void the

bladder if taken out of the crate, but not while confined in the crate; and that, having been thus confined constantly, in disobedience of the instruction, the result was that the animal contracted acute peritonitis, resulting in its death.

"The defendant contends that the shipper's direction called for a special service, expressly forbidden by the rules of the Interstate Commerce Commission, and that therefore the defendant could not, and was not required to comply with such direction.

"In our opinion, the instruction in question did not demand a special service. It called for nothing more than certain care of the animal while in transit, and no unreasonable degree of attention or service was necessary in order to obey the instruction. No statute nor regulation has been pointed out which relieves the defendant, as a common carrier, of the usual responsibility of caring for animals, delivered to it for transportation, while the same are in transit. The fact that the carrier could not make a charge for a service, unless such charge is provided for in the published tariffs and classifications, does not affect the existence of the duty to render such service as is necessary to the proper care of live stock in transit. We find nothing in the record to take this case out of the rule which makes it the duty of a carrier to follow shipping directions. 10 C. J. 81, §83.

"The evidence is sufficient to support the judgment, and the judgment is therefore affirmed."

## CHAPTER IV.

### LIABILITY AFTER ARRIVAL AT DESTINATION.

#### Misdelivery.<sup>1</sup>

1. The petition alleges, in substance, that two separate shipments of toys were sent from Chicago to the owner at Augusta, Ga.; that the goods were received by the defendant company as the last connecting carrier, and were held in the defendant's warehouse at Augusta for a stated long and unreasonable period, without notice to him, although it was the custom at Augusta for railroad companies receiving freight to notify consignees immediately after its arrival; that he was an old citizen of Augusta, and had been a merchant there for the past 18 years, and his name and address were in the city directory, and the defendant knew, or by the exercise of ordinary care and diligence could have known, his address; that after the arrival of this freight he was told repeatedly in reply to inquiries at the defendant's freight office and depot, that it had not arrived; that he informed the defendant that one of the boxes of toys had been purchased by him for the Christmas trade; that when finally notified of its arrival he complained to the defendant of the long delay in giving him notice, and the defendant notified him that he could get the goods only by paying certain storage charges in addition to the freight. The petition further alleges, as to the second shipment, that had the defendant given

him prompt notice of the arrival of the goods he could have disposed of them at a profit; that the goods contained in the first shipment were not salable by him except for the Christmas trade; that goods in the last shipment could have been sold by him had they been promptly delivered, but not later; that because of the alleged unreasonable delay the plaintiff refused to accept the goods, as they were at that time "valueless to him"; that the defendant was negligent because of the unreasonable delay in notifying him of the receipt of the goods, and not allowing him to receive his goods within a reasonable time after their arrival, and by reason thereof he was damaged in the sum of \$450. To the petition as amended the defendant demurred, upon the ground that it failed to set out a cause of action. The trial court overruled the demurrer, and the defendant excepted. Held:

"The general rule is that the measure of damages for unreasonable delay by a common carrier in the delivery of goods shipped is the difference between their market value when they should have been delivered and their market value when they were delivered, with interest from the former date, less the freight, if unpaid." (Southern Express Co. v. Hanaw, 134 Ga. 445, 459, 67 S. E. 944,

137 Am. St. Rep. 227; Civ. Code 1910, § 2773; *Southern Railway Co. v. Bloch*, 18 Ga. App. 769, 90 S. E. 656), and in the absence of a special contract this measure of damages by delay is exclusive (*Wilensky v. Central Railway Co.*, 136 Ga. 889, 893, 72 S. E. 419, Ann. Cas. 1912D, 271; *Columbus & Western Railway v. Flournoy*, 75 Ga. 745). If the delivery of goods has been unreasonably delayed by the carrier, the owner must sue for the damages prescribed in section 2773 of the Civil Code, since mere unreasonable delay in transporting does not amount to conversion, so as to authorize the consignee, upon the arrival of the goods, to reject them and sue for their value on that theory. *Southern Express Co. v. Hanaw*, *supra*; *Wilensky v. Central Railway Co.*, *supra*.

As held by this court in a former suit between the same parties respecting the same transaction (*Southern Railway Co. v. Bunch*, 22 Ga. App. 42, 95 S. E. 323), the suit as now

brought is for damages for an unreasonable delay in delivering shipments, and not for a conversion. The petition having alleged the contract of carriage, the duty owing by the defendant to the plaintiff, the breach of the contract, and the resulting breach of duty, and alleging generally that the plaintiff was damaged in the sum of \$450 by reason of such breach, it was sufficient to sustain at least a recovery for nominal damages, and the court did not err in overruling the general demurrer thereto. That the plaintiff went further and undertook specifically to state what would be erroneous elements of such damage, and how and wherein they accrued, was matter for special demurrer. *Moss & Co. v. Fortson*, 99 Ga. 496, 499, 27 S. E. 745; *Sutton v. Southern Railway Co.*, 101 Ga. 776, 29 S. E. 53; *Graham v. Macon, D. & S. R. Co.*, 120 Ga. 757, 49 S. E. 75.

*Southern Ry. Co. v. Bunch* (Ga. 1920), 102 S. E. 462.

## CHAPTER V.

### LIABILITY FOR NEGLIGENCE.

**In General.** The Act of March 4, 1909, § 233. authorizing the Interstate Commerce Commission to regulate the transportation of explosives, and sections 1643 and 1689 of the regulations adopted thereunder, do not absolve carriers from exercising the care commensurate with the risk of danger arising from concentration of a large quantity of high explosives in close proximity to densely populated cities, and at a terminal exposed to and unprotected against intruders and incendiaries, and without proper facilities to promptly meet the outbreak of a fire, or any other danger reasonably to be apprehended.<sup>1</sup> Neither do such laws and regulations fix the entire degree of care to be exercised by a common carrier in the case and custody of explosives.<sup>2</sup> Though where inflammable property near a railroad is discovered to be on fire soon after the passing of an engine emitting sparks, the jury may infer that the fire originated in the sparks, in the absence of evidence to explain its origin, upon any other theory, they are not bound to infer that it so originated.<sup>3</sup>

1. *Howell v. Lehigh Valley R. Co.* (N. J. 1920), 109 Atl. 309.

2. *Howell v. Lehigh Valley R. Co.* (N. J. 1920), 109 Atl. 309.

3. *May v. Missouri Pac. R. Co.* (Ark. 1920), 219 S. W. 756.

In *Singer v. American Express Co.* (Mo. 1920), 219 S. W. 662, the court said, p. 663:

"This action was instituted to recover damages alleged to have been sustained by plaintiff to a carload of strawberries, which were shipped from Hammond, La., to Kansas City,

Mo., on the 15th of April, 1918. The judgment in the trial court was for the plaintiff.

"The action is avowedly based solely on a carrier's common-law liability as an insurer. Nothing was shown by plaintiff, save that the berries were shipped from Hammond in good condition, and that they arrived in Kansas City in bad condition, and the amount of damages. There is no pretense of liability by reason of any negligence or want of care in transit.

"When plaintiff made proof of shipment in good condition, and arrival

**Initial Carrier.** An initial carrier, liable under the Carmack Amendment for damage to the goods in the hands of any succeeding carrier, has a remedy over against the carrier in default,

at destination in bad condition, together with the damage to the berries, he closed his case, and defendant offered a demurrer to the testimony, which was overruled. Whereupon defendant introduced evidence tending to show a regular bill of lading for the shipment and that there was no negligence. In keeping with his position that defendant was an absolute insurer, plaintiff did not offer any evidence in rebuttal, and defendant again offered an instruction directing a verdict for it. So we are brought to the sole question of whether a carrier is an insurer at common law against damage to freight which is perishable by its own inherent nature. We decided at this term, in a case involving the freezing of potatoes in transit (*Clemons Produce Co. v. Railroad*, 219 S. W. 660), that he was not, and we stated the same rule in *Kolkmeier v. Railroad*, 192 Mo. App. 188, 195, 182 S. W. 794, *Cudahy Packing Co. v. Railroad*, 193 Mo. App. 572, 187 S. W. 149, and *Collins v. Railroad*, 181 Mo. App. 213, 167 S. W. 1178; and this is established law (*Brennisen v. Railroad*, 100 Minn. 102, 105, 110 N. W. 362, 10 Ann. Cas. 169; *Daniels v. Railroad*, 88 Or. 421, 427, 429, 171 Pac. 1178; *Michellod v. Railroad*, 86 Or. 329, 335-338, 168 Pac. 620). The foregoing cases, while denying that a carrier is an insurer at common law of perishable fruit or commodities inherently subject to decay or loss, yet hold that where he engages to carry such articles (with no exemption) it is implied that he will not be negligent—that he will exercise

such care and diligence as will be reasonably necessary for the safe carriage of that character of freight. *Brennisen v. Railroad*, supra; *Taft Co. v. Express Co.*, 133 Iowa, 522, 110 N. W. 897, 119 Am. St. Rep. 642—cases involving agreement to ice berries in refrigerator cars.

"But, so far as concerns the case before us, it must be kept in mind that the shipment in question was interstate, and that the rule governing defendant's liability must be sought in the 'acts of Congress' and the 'common law as accepted and applied in the federal tribunals.' *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319, 327, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265. Before the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) to the Interstate Commerce Law, it was said in *Adams Express Co. v. Croninger*, 226 U. S. 491, 504, 33 Sup. Ct. 148, 151 (57 L. Ed. 314, 44 L. R. A. [N. S.] 257), that—

"The rule of a carrier's liability for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States \* \* \* or that determined by the supposed public policy of a particular state, \* \* \* or that prescribed by statute law of a particular state, \* \* \* neither uniformity of obligation nor of liability was possible until Congress should deal with the subject."

"That state of affairs led to the

adoption of the amendment, which, the court said, superseded 'all the regulations and policies of a particular state on the same subject \* \* \*'. The court then asked, What is this liability thus imposed upon the carrier? and answered the question in these words:

"It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage, or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words "any loss or damage" would be to ignore the qualifying words "caused by it." The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common-law duty as a common carrier.'

"It seems this expression of the court, in its entirety, has been misunderstood; for afterwards, in *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265, the court only quoted the last sentence therein, and then said that, '*properly understood*, neither this nor any other of our opinions holds' that the Carmack Amendment changed the common-law doctrine in respect to a carrier's liability. (Italics ours.) In the *Croninger Case* Justice Lurton,

we think, did not intend to say that the common-law liability of the carrier was restricted by the amendment, but merely meant that the amendment did not enlarge that liability by making the carrier absolutely responsible for every loss from every cause, and thereby becoming an absolute insurer against every loss, 'though due to uncontrollable forces,' for that character of liability would hold the carrier responsible for a loss caused by the act of God, the public enemy, or the inherent vice or perishable nature of the freight. The liability imposed by the amendment in the use of the words 'caused by it' is a liability arising from some default in its common-law duty as a common carrier; that is to say, those words mean the carrier must have done some act not justified by the common law, or omitted to do some act required by that law, which caused the loss.

"If the carrier is not remiss in any common-law duty towards the shipment, yet a loss follows, such loss is not caused by the carrier in the sense of the statute. It is the common-law duty of a carrier to bring a shipment safely through all hazards, save the act of God, the public enemy, or the inherent nature of the freight. The fact first shown by the shipper, of receipt in good condition and delivery in bad condition, is a *prima facie* showing that the carrier has failed in this common-law duty, and to escape liability he must show that the shipment falls within the exception, unless, of course, the shipper's own evidence makes that showing.

"A carrier is not an insurer of perishable fruit, if the damage is caused by it perishing; but he is an insurer in all other respects, just as if it were not perishable, as, for in-

if it was not itself negligent.<sup>4</sup> So it was immaterial under the Carmack Amendment, as to a shipment of potatoes by several carriers, whether the initial carrier was negligent, for such initial carrier was answerable for the negligence of succeeding carriers.<sup>5</sup> When the consignor controls the bill of lading, or has the right to change the destination or divert the goods to a new one, a reconsignment does not break the connection; but the new destination is regarded as the original one, to determine the liability of the initial carrier.<sup>6</sup>

stance, it be injured in a wreck, or fire, or any other cause not the act of God or the public enemy. Therefore it is not correct to say, broadly, that a carrier is not an insurer of perishable fruit, and it follows that he should exculpate himself by showing that the loss charged resulted from perishing, and the burden is on him to do that, unless the case made by plaintiff shows it. In this instance plaintiff himself has shown that the berries were damaged by reason of their perishable nature, and therefore defendant is not liable in the character he was sued, viz. an insurer.

"The result is that the judgment is reversed.

"All concur."

4. Produce Trading Co. v. Norfolk Southern R. Co. (N. C. 1919), 100 S. E. 316.

5. Produce Trading Co. v. Norfolk Southern R. Co. (N. C. 1919), 100 S. E. 316.

6. Produce Trading Co. v. Norfolk Southern R. Co. (N. C. 1919), 100 S. E. 316.

In *Southern Ry. Co. v. Finley & Seymour* (Va. 1920), 102 S. E. 559, the court said:

"The Southern Railway Company complains of a judgment in favor of *Finley & Seymour* for damages to

mules shipped from Lexington, Ky., to Danville, Va., caused by the alleged negligent failure of the company to supply them with sufficient food and water during the transportation. The company filed its demurrer to the plaintiffs' evidence, which the court overruled, and gave judgment for the plaintiffs.

"There are three assignments of error.

"The first is stated thus:

"The evidence shows that the said Cincinnati, New Orleans & Texas Pacific Railway Company was the initial carrier issuing the bill of lading covering the carload of mules in question in this case, and that therefore the said defendant is not a proper party, plaintiffs' right of action being against said initial carrier and it alone."

"The company cites and relies on the case of *Chesapeake & Ohio Ry. Co. of Indiana v. National Bank of Commerce*, 122 Va. 471, 95 S. E. 454, and makes several quotations from the opinion, among them this language:

"\* \* \* And in such case the first contract remains in force by virtue of said federal statute law, and the shipper and all assignees of his claiming through him (all of whom could have enforced such original contract) have no right of action for

**Connecting Carrier.** Under the Carmack Amendment authorizing the shipper of an interstate shipment to sue the initial carrier for the defaults of connecting carriers, but providing

damages against such subsequent carrier, but only against the initial carrier.'

"When the language of any opinion is to be construed, the first consideration should be directed to the precise question which was before the court when the language was used. This being ascertained, then the language should be construed as relating to that question. The issue in the case of *C. & O. Ry. Co. v. Bank*, *supra*, was whether the Union Pacific Railroad Company or the Chesapeake & Ohio Railway Company of Indiana was the initial carrier. The shipment in that case originated at Medicine Bow, Wyo., and an order notify bill of lading was issued by the Union Pacific Railroad Company for the transportation of horses from that point to Windsor, N. C., by way of Chicago. It appeared, however, that there was a tariff regulation in existence, which had been filed with the Interstate Commerce Commission and was effective, which prohibited the movement of live stock east of Chicago on such a bill of lading. So that it was necessary, because of that lawful regulation, to stop the shipment at Chicago. Thereupon the owner entered into a new contract with the Chesapeake & Ohio Railway Company of Indiana for the shipment of the horses from Chicago to Windsor, N. C.; the original bill of lading being surrendered and a new one issued therefor by the Chesapeake & Ohio. The chief controversy in that case, then, was whether the Union Pacific or the Chesapeake & Ohio was liable as the initial carrier, and all

that is said in the opinion must be construed in view of the fact that the court determined that the Chesapeake & Ohio was such initial carrier, and therefore subject to the responsibilities imposed upon initial carriers by the Carmack Amendment. Every expression used in that opinion, which can be fairly construed as indicating that the connecting and delivering carriers of an interstate shipment cannot be sued for their own negligence, was inadvertent and is disapproved. That question was not involved nor remotely considered in that case. It is perfectly well settled that a connecting or delivering carrier may be sued for its own defaults, and so far as we are advised there is no conflict of authority on this point.

In the case of *Georgia, F. & A. Ry. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, where it appeared that the shipment originated at Seymour, Ind., and that the Baltimore & Ohio Southwestern Railroad Company was the initial carrier, that the shipment was transported over the Central of Georgia Railroad Company, a connecting carrier, and reached its destination over the line of the Georgia, Florida & Alabama Railway Company, the delivering carrier, the first question raised is identical with that here involved, and is thus stated by the court:

"That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of section 20 of the Hepburn Bill.'

that nothing therein shall deprive any holder of a bill of lading of existing remedies or rights of action, a connecting or delivering carrier is liable for its own defaults resulting in damage to

"And the court disposes of that claim in this language:

"The first contention is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. "The liability of any carrier, in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment, so far as it is valid under the act." *Kansas Southern Ry. Co. v. Carl*, 227 U. S. 639, 648 [33 Sup. Ct. 391, 57 L. Ed. 683]. See *Adams Express Co. v. Croninger*, 226 U. S. 491, 507, 508 [33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257]; *C., C. & St. L. Ry. v. Dettlebach*, 239 U. S. 588, 591 [36 Sup. Ct. 177, 60 L. Ed. 453]; *Southern Railway v. Prescott*, 240 U. S. 632, 637 [36 Sup. Ct. 469, 60 L. Ed. 836]; *Northern Pacific Ry. v. Wall*, ante [241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905].

"Among the instructive cases decided by the Supreme Court of the United States in which the connecting or terminal carrier has been sued and held responsible under the bill of lading issued by the initial carrier are *C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 591, 36 Sup. Ct. 177, 60 L. Ed. 453, and *Missouri, K. & T. R. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213. In

the latter case this is said:

"The purpose of the Carmack Amendment has been frequently considered by this court. It was to create in the initial carrier unity of responsibility for the transportation to destination. *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U. S. 186 [31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7]; *Northern Pacific Ry. Co. v. Wall*, 241 U. S. 87, 92 [36 Sup. Ct. 493, 60 L. Ed. 905]. And provisions in the bill of lading inconsistent with that liability are void. *Norfolk & Western Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593 [33 Sup. Ct. 609, 57 L. Ed. 980]. While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading."

"The same rule is followed in the recent cases of *John Lysaght, Limited, v. Lehigh Valley R. Co.* (D. C.) 254 Fed. 353; *Elliott v. Chicago, M. & St. P. Ry. Co.*, 35 S. D. 57, 150 N. W. 777; 10 C. J. 542.

"The reasons for this conclusion have been so frequently stated as to need no repetition. The Carmack Amendment itself, which provides that the shipper may sue the initial carrier, either for its own default or for the default of any connecting carrier, contains this conclusive proviso:

"That nothing in this section shall deprive any holder of such \* \* \* bill of lading of any remedy or right of action which he has under the existing law." U. S. Comp. St. § 8604a.

"So that there can be no doubt that the initial carrier may be sued, either for its own negligence or for that of any connecting carrier, while each of the connecting carriers may be sued for its own default or negligence.

"The second assignment is based upon what is called a fatal variance between the allegations and the proof; it being alleged in the declaration that the mules were delivered to the defendant company at Lexington, Ky., whereas the bill of lading shows that they were delivered to the Cincinnati, New Orleans & Texas Pacific Railway Company at Lexington, Ky. The established rule in Virginia is that objection for a supposed variance between the allegations and the proof should be made in the trial court, and that the appropriate method of making such objection is to move to exclude the evidence. *Bertha Zinc Co. v. Martin*, 93 Va. 801, 22 S. E. 869, 70 L. R. A. 999; *Newport News & Old Point Ry. & E. Co. v. McCormick*, 106 Va. 517, 56 S. E. 281; *Va. & Southwestern Ry. Co. v. Bailey*, 103 Va. 228, 49 S. E. 33; *Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91 S. E. 763, Ann. Cas. 1918B, 1171; *Standard Paint Co. v. Vietor*, 120 Va. 595, 91 S. E. 752.

"The question is controlled in this state by Code 1919, § 6250, so frequently construed, which provides that, if a variance between the evidence and the allegations appear, the court, if it considers that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, or, instead of having the pleadings amended, may direct the jury to find the facts, and, if it consider the variance such as could

not have prejudiced the opposite party, may give judgment according to the right of the case, and also by Code 1919, § 6104, which provides that the court may at any time, in the furtherance of justice and upon such terms as it may deem just, permit pleadings to be amended, and that at every stage of the proceedings the court shall disregard any error or defect which does not affect the substantial rights of the parties.

"In this case there was no surprise whatever, because the company itself introduced the bill of lading which it now claims produces the variance. The case was fairly tried and submitted to the jury; the attention of counsel, court, and jury being directed only to ascertaining the responsibility of the company as the delivering or terminal carrier. Whenever it is desired to raise a question of this character, which may be cured by amendment of the pleadings, it should be raised by motion to exclude the evidence.

"It is also claimed that the evidence is insufficient to support the judgment; and there is much discussion in the briefs as to whether the burden of proof as to the cause of the damage was upon the plaintiffs or the company. In our view, the weight of authority is that such burden is upon the company when it receives for transportation live stock in good condition, unaccompanied by the owner or his agent, and delivers it in damaged or bad condition. *Galveston, H. & S. F. Ry. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 523 (a pertinent case, though not involving a shipment of live stock); *Church v. Chicago, B. & Q. R. Co.*, 81 Neb. 615, 116 N. W. 520; *Teeter v. Southern Express Co.*, 172 N. C. 616,

live stock.<sup>7</sup> Where there was evidence of the good condition of a shipment when loaded on the car of an intermediate carrier, the burden was on such carrier to prove the shipment continued in the same good condition as when received until it had been delivered to the next carrier.<sup>8</sup>

90 S. E. 761; *Illinois Cent. R. Co. v. Word*, 149 Ky. 229, 147 S. W. 949: note 130 Am. St. Rep. 442. In the case in judgment this question is immaterial, because the jury might fairly have inferred from the evidence that the damage to the mules was caused by the negligent failure of the defendant company to feed and water them properly during their long journey, and therefore the trial court was bound so to conclude under the demurrer to the evidence rule.

"The judgment is plainly right."

7. *Southern Ry. Co. v. Finley & Seymour* (Va. 1920), 102 S. E. 559.

In a suit against a connecting carrier in interstate commerce to recover for damage to goods received by it from a preceding carrier and delivered by the connecting carrier at the point of destination in a damaged condition, proof that the goods were delivered in a good condition to the initial carrier raises a presumption that they were received in good condition by the connecting carrier. There is nothing in the acts of Congress, including the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604, 8604aa]), fixing the liability for interstate carriers for goods damaged in transit, which relieves a connecting carrier of this presumption. *Central of Georgia Ry. Co. v. Scrivens* (Ga. 1919), 100 S. E. 233.

The presumption that goods delivered in good condition to the initial

carrier were in good condition when received by the connecting carrier is not conclusive as a matter of law, but may be rebutted by proof. In the absence of competent evidence rebutting this presumption, and showing that the goods were not in good condition when received by the connecting carrier, the evidence is sufficient, where there is proof of the other material allegations in plaintiff's petition, to support a verdict against the connecting carrier. *Capital City Oil Co. v. Central of Ga. Ry. Co.*, 16 Ga. App. 750, 86 S. E. 57. Where the only evidence introduced in rebuttal of this presumption was that of the baggage master of the connecting carrier, who testified that the goods were received by such connecting carrier from the preceding carrier in bad condition, and that he knew this only from his records, the jury had a right to conclude that the witness was testifying to a conclusion merely, and had no actual personal knowledge of the circumstances. In view of the presumption, it cannot be said that as a matter of law this evidence was conclusive of the fact that the carrier had received the goods in a bad condition. *Nashville, Chattanooga & St. Louis Ry. v. Truitt Co.*, 17 Ga. App. 236, 240, 86 S. E. 421. *Central of Georgia Ry. Co. v. Scrivens* (Ga. 1919), 100 S. E. 233.

8. *Produce Trading Co. v. Norfolk Southern R. Co.* (N. C. 1919), 100 S. E. 316.

## CHAPTER VI.

### CIRCUMSTANCES RELIEVING CARRIER OF LIABILITY.

**In General.** If a carrier accepts goods for shipment with full knowledge of floods and washouts on its line and the line of connecting carriers, it should notify the shipper of the same, or stipulate against the consequences, and if it fails to do so it should not be heard to offer as an excuse that delay in shipment was caused by an act of God.<sup>1</sup>

**Fault of Shipper.** Where tariffs, made part of bill of lading, stipulated that, if a stove was to be used in a car, the fuel and attendant should be furnished by the shipper, a shipper of potatoes, who made no provision for heating a car, assumed the risk of injury to the shipment from extremely cold weather.<sup>2</sup>

**Act of God.** In an action for damages to goods, the carrier, by showing that the loss was occasioned by the act of God, puts the burden on the shipper of showing that the carrier's negligence also contributed to the injury.<sup>3</sup>

**Delivering Carrier.** Where a shipment is delivered in bad condition, and it is shown that it was received by the initial carrier in good condition, the presumption of law is that the shipment was injured on the line of the delivering carrier.<sup>4</sup>

1. *Gray v. Seaboard Air Line Ry. Co.* (S. C. 1918), 102 S. E. 512.

2. *Clemons Produce Co. v. Denver & R. G. R.* (Mo. 1920), 219 S. W. 660.

3. *Rezsek v. Southern Pac. Co.*, 181 N. Y. S. 117.

4. Where the evidence gives rise to a reasonable inference that a shipment of horses was injured while being transported by defendant railroad, the action for such injuries was

properly brought, under the federal Interstate Commerce Law, against terminal instead of the initial carrier. *Faulk v. Seaboard Air Line Ry. Co.* (S. C. 1919), 101 S. E. 641.

In *Faulk v. Seaboard Air Line Ry. Co.* (S. C. 1919), 101 S. E. 641, the court said, p. 643:

"There is no direct and positive testimony that the horses were injured while being transported by the defendant, but it is susceptible of a reasonable inference to that effect.

Having reached this conclusion, the action was properly brought against the terminal instead of the initial carrier. *Atlantic C. L. R. v. Glenn*, 239 U. S. 388, 36 Sup. Ct. 154, 60 L. Ed. 344; *Georgie v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

"As this case arose under the Interstate Commerce Law (Act Feb. 4, 1887, c. 104, 24 Stat. 379), it is unnecessary to construe a similar statute of this state; it being applicable only to intrastate commerce."

The Stovall-Pace Company brought suit against the Atlantic Coast Line Railroad Company, the last of certain connecting carriers, for the loss of a certain box of goods shipped from East Dedham, Mass., to Augusta, Ga., alleging that "the defendant received the goods described in paragraph 3 of plaintiff's complaint, from its connecting carrier, the said goods being in good order, but that said defendant has never delivered said goods to petitioner." A demurrer to the petition alleged in part that the peti-

tion should be dismissed "because under the Interstate Commerce Act the original carrier alone is responsible." The plaintiff did not expressly declare upon the state or federal statute, but merely pleaded the facts relied on to show liability against the last connecting carrier. The allegations were sufficient to show that the loss was caused by negligence of the defendant. "The wrong here complained of was committed by the defendant, not by the initial company, and the plaintiff is not excluded from suing the wrongdoer." The demurrer was properly overruled. *Southern Railway Co. v. Morris*, 147 Ga. 729, 95 S. E. 284 (1); *Western & Atlantic Railroad Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644 (2); *Cincinnati, etc., Ry. Co. v. Quincey & Rogers*, 19 Ga. App. 167, 91 S. E. 220; *Atlantic Coast Line R. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 78 S. E. 1019 (1). *Atlantic Coast Line R. Co. v. Stovall-Pace Co.* (Ga. 1919), 100 S. E. 657.

## CHAPTER VIII.

### DAMAGES RECOVERABLE.

**Limitation of Liability in General.** Altho now a limitation of liability in an interstate shipment is only valid when authorized by the Interstate Commerce Commission, there are still a few cases of interest being decided on the general proposition.<sup>1</sup>

1. A special contract, executed between a common carrier and a shipper, in consideration of a lower freight rate, providing that in case of loss or damage to the property the liability of the carrier shall not exceed a maximum valuation per 100 pounds, is not a contract attempting to exempt the carrier from liability on account of its own negligence; and, if the contract is reasonable and just, and has been fairly entered into by the shipper, the same will be upheld as a proper and lawful means of determining the amount of the carrier's liability in case of loss. *Lusk v. Durant Nursery Co.* (Okla. 1920), 188 Pac. 104.

Where a seller of certain articles of merchandise failed to declare a value upon the articles shipped, he is limited to the value stipulated in the shipping contract in such case, and as to shipments embracing more than one article, and where only a part were lost, the limitation must be applied pro rata. *Lewis v. American Railway Express Co.*, 180 N. Y. S. 751.

Where butter, cheese, and eggs or-

dered were delivered to a carrier for shipment to the buyer, but lost in transit, the seller, although he has submitted proof of the actual value of the goods, is bound by the rule of law that the shipper is bound by the contract to limit the recovery in case of loss. *Lewis v. American Railway Express Co.*, 180 N. Y. S. 751.

Under the laws of Virginia an attempted limitation of the liability of a common carrier is void where the injury or loss is occasioned by the negligence or misconduct of the carrier. *Adams Express Co. v. Allen* (Va. 1919), 100 S. E. 473.

Provisions in the face and on the back of an express receipt for hog cholera serum shipped held not to have limited the liability of the express company to the sum of \$50, there having been no value declared by the shipper, but merely the C. O. D. charge stated. *Adams Express Co. v. Allen* (Va. 1919), 100 S. E. 473.

A common carrier cannot stipulate against loss by its own negligence, and a note on an express company's bill of lading that if the goods were hidden from view the recovery for

**Provisions in Bill of Lading.** A recent state case has held section three of the bill of lading valid. However, this case was decided before the decision in the Supreme Court of the United States which held such section void.<sup>2</sup> In affirming the decision of the lower court, the Supreme Court of the United States, in the famous case of *McCaull-Dinsmore Co. v. C., M. & St. P. Ry.*, (decided May 17, 1920) said: "This is an action for the loss of grain belonging to the plaintiff and delivered on November 17, 1915, to the defendant, the petitioner, in Montana, for transportation to Omaha, Neb. The grain was shipped under the uniform bill of lading, part of the tariffs filed with the Interstate Commerce Commission, by which it was provided that 'the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid.' The petitioner has paid \$1,200.48, being the amount of the loss so computed, but the value of the grain at the place of destination at the time when it should have been delivered, with interest, less freight charges, was \$1,422.11. The plaintiff claimed the difference between the two sums on the ground that the Cummins Amendment to the Interstate Commerce Act made the above stipulation void. The District Court gave judgment for the plaintiff, 252 Fed. Rep. 664, and the judgment was affirmed by the Circuit Court of Appeals, 260 Fed. Rep. 835. The Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, provides that the carriers affected by the Act shall issue a bill of lading and shall be liable to the lawful holder of it 'for any loss, damage, or injury to such property . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability

loss should not exceed \$50 was not valid. *Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

2. In an action against a carrier for damages to shipment of melons, where defendant invoked as a defense a stipulation in the contract fixing

the market value of the melons at the "place and time of shipment," the burden was upon the defendant, the plaintiff having established a market price or value which was not in accordance therewith, to show the correct one, if prejudiced by the estimate of the plaintiff. *Gray v. S. A. L. Ry.* (S. C. 1918), 102 S. E. 512.

hereby imposed' and further that the carrier 'shall be liable . . . for the full actual loss, damage, or injury . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void.' Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of the goods but merely offering the most convenient way of finding the value. *Shaffer vs. Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C. 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law; 33 I. C. C. 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the meaning of a statute and upon that, of course, the courts must decide for themselves. We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the question is how the contract operates upon this case. In this case it does prevent a recovery of the full actual loss, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause nor any argument based upon the history of the statute or upon the policy of the later Act of August 9, 1916, c. 301, 39 Stat. 441, can prevail against what we understand to be the meaning of the words. Those words seem not only to indicate

a broad general purpose but to apply specifically to this very case. Judgment affirmed. The Chief Justice dissents for the reasons stated by the Interstate Commerce Commission."

### **Delay in Transit.<sup>3</sup>**

**Incidental Expenses.** A shipper of live stock under a special contract may recover from the carrier any damage sustained by him as a result of any extra expense which he may have incurred in feeding and caring for such live stock by reason of any unreasonable delay caused by the gross neglect of the carrier in failing to transport and deliver the shipment at the point of destination.<sup>4</sup>

**Damages for Partial Loss.** Where a shipment of a carload of household goods, weighing 12,000 pounds and of a value not exceeding \$1,200, as "stated for the purpose of enabling the carrier to apply the proper published rate," is partially damaged or destroyed through the carrier's negligence, and the bill of lading contains no limit of recovery in case of loss or damage and no statement as to any ratio of recovery in case of partial loss or damage, the amount of the shipper's recovery depends upon proof of his actual loss or damage within the limits of the declared value of the entire shipment, and not upon the ratio the weight of the articles destroyed or damaged bore to the entire shipment.<sup>5</sup>

3. Where a carrier fails to deliver goods in a reasonable time, the measure of damage is the difference between the market value at the time and place they should have been delivered and the time of actual delivery (Civ. Code 1910, § 2773); and a common carrier cannot by special contract relieve itself from this measure of damage, where the goods are damaged by reason of its negligence. *Seaboard Air Line Ry. Co. v. Pruitt* (Ga. 1920), 102 S. E. 182.

4. *Seaboard Air Line Ry. Co. v. Pruitt* (Ga. 1920), 102 S. E. 182.

5. *Candee v. Delaware, L. & W. R. Co.* (N. J. 1920), 109 Atl. 202.

In *Candee v. D., L. & W. Ry.* (N. J. 1920), 109 Atl. 202, the court said:

"On June 11, 1917, Charles S. Candee, Jr., caused to be delivered to the Delaware, Lackawanna & Western Railroad Company at Syracuse, N. Y., some household goods to be carried by it to him in Brooklyn, in consideration of the freight charges then paid to the railroad company.

"Some of the goods so shipped were delivered in due course uninjured; others of the shipment were destroyed, and some others were damaged, through the negligence of the railroad. Candee brought this suit to recover the consequent damages and the trial judge, at the Hudson

circuit, sitting without a jury, on an agreed state of facts rendered judgment for the plaintiff, and the defendant appeals.

"We are of the opinion that the appeal is without merit.

"Before stating the contention of the defendant, which relates solely to the amount of the damages, we will state more fully the facts.

"The shipment consisted of furniture, mirrors, glassware, and the like. It was an interstate shipment; the rail route being via Pennsylvania and New Jersey. When the goods were delivered to the defendant company by the plaintiff, he received a bill of lading from which it appears that they were all put in one car and that their weight was 12,000 pounds. Upon this bill of lading there is a declaration signed by the plaintiff's agent, that—

"The value of this shipment does not exceed ten (10) dollars per one hundred (100) pounds and is stated for the purpose of enabling the carrier to apply the proper published rate."

"There was no statement in the bill of lading as to any limit of recovery in case of loss or damage, and no statement as to any ratio of recovery in case of partial loss or damage. The agreed state of the case shows that the filed tariff rate covering the shipment of goods in question was 31.5 cents per 100 pounds, and that the plaintiff paid \$37.80, the amount demanded. It was further agreed that the value of the goods totally destroyed was \$335; that it would cost the plaintiff to repair the goods damaged (not destroyed) \$468. The trial judge accordingly awarded the plaintiff \$803.

"Now the contention of the defen-

dant is stated in its request (refused by the trial judge), which was as follows:

"Inasmuch as the defendant conceded liability, it asks the court that judgment be given against it for 6 cents, or nominal damages, for the reason that the basis for ascertaining damages is fixed and figured on an agreed valuation of \$10 per hundred pounds, and there is no evidence, attempt to prove, or stipulation of fact as to the weight of any article destroyed or damaged, and there is no evidence, attempt to prove, or stipulation of fact as to the total weight of all the articles destroyed or damaged, or no attempt to prove, evidence or stipulation of fact as to what ratio with respect to their weight the goods destroyed or damaged bear to the entire shipment, and under these circumstances there is nothing upon which the court can proceed to figure, ascertain, or assess any but nominal damages."

"We think the request was properly refused because the contract placed no such limit upon the right of recovery.

"We have pointed out that the shipment was not a homogeneous one, but rather consisted of various articles of household goods; that the entire shipment weighed 12,000 pounds; that some of the goods were delivered uninjured, some were damaged, and some were totally destroyed. The value of the goods as stated in the bill of lading was not exceeding \$1,200, and was "stated for the purpose of enabling the carrier to apply the proper published rate." There was no statement in the bill of lading as to any limit of recovery in case of loss or damage, and no statement as to any ratio of recovery in case of

**Rough Handling in Transit.<sup>6</sup>**

**Special Damages.** Where an express company, receiving tools for shipment from carpenters, was told through its agent that the carpenters wanted them shipped to a point where there were other government construction camps, the express company, by the exercise of ordinary care, would have known for what purpose the tools were to be shipped, and is responsible for any loss approximately caused by its negligence in failing to transport.<sup>7</sup> An express company, by which the department of

partial loss or damage. In such circumstances the amount of the plaintiff's recovery depends upon proof of his actual loss or damage, within the limits of the declared value of the entire shipment, and not upon the ratio the weight the articles destroyed or damaged bore to the entire shipment. *Central of Georgia Ry. Co. v. Broda*, 190 Ala. 266, 67 South. 437; *Chicago, L. & L. Ry. Co. v. Priddy*, 115 N. E. 266; *Carleton v. N. Y. C. & H. R. R. Co.*, 64 Misc. Rep. 51, 117 N. Y. Supp. 1021, *affd.*, 137 App. Div. 225, 121 N. Y. Supp. 997; *Huguelet v. Warfield*, 84 S. C. 87, 65 S. E. 985.

"The recovery in the present case was well within that rule."

6. Where, in a suit by a shipper against a common carrier for loss or damage to goods in transit, it appears from the evidence that some of the goods were not totally damaged or destroyed but were of some value, and the evidence failing to furnish sufficient data from which a jury might infer the value of the damaged articles, the verdict is without evidence to support it. Plaintiff brought suit against the defendant, a common carrier, for failure to deliver in good condition a shipment of eggs, alleging a total destruction of a part of such shipment;

and, it appearing from the evidence that some of the eggs, for the value of which suit was brought, were totally destroyed, and others partially destroyed, but retaining some value, the evidence failing to show how many were totally destroyed or how many partially destroyed, and failing further to show the value of such partially damaged eggs, which should be credited against plaintiff's claim for a total damage, the evidence is insufficient to support a verdict covering damages for eggs both totally and partially destroyed. *Southern Express Co. v. Bass* (Ga. 1920), 102 S. E. 168.

7. *Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

In an action by carpenters against an express company for delay in transporting tools, the expense and loss of time in returning home to get new sets of tools, and for the loss in having a double set each, were not items of loss, but for consideration by the jury in estimating plaintiff's loss. *Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

Plaintiffs, who shipped tools by express, were entitled to recover as damages from failure to transport

agriculture of Virginia made a shipment of hog cholera serum, informed that it was such serum, and of the importance of prompt dispatch, while the words "Please rush" appeared on the

and deliver the loss which proximately accrued from violation of the company's contract of prompt and safe carriage, and which could have been reasonably presumed to have been in contemplation of the parties when the contract was made, and to have resulted from failure to perform. *Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

In this case claimant shipped tools to railroad construction crews, by express, which were delayed in transit. The court said:

"The object in sending the tools by express was to secure their prompt and safe delivery. The plaintiffs were entitled to recover as damages for breach of the contract such loss which proximately accrued from the violation of the contract of prompt and safe carriage of the tools, and which could have been reasonably presumed to have been in contemplation of the parties when the contract was made, and as a result of the failure to perform the defendant's part thereof.

"The jury trying the case after the tools had been found estimated plaintiff's damages in the loss of time and expenses at \$150, and there was evidence to authorize such finding. When the plaintiffs delivered two boxes of tools to the defendant at Lee Hall for transportation (where there was a government camp), they told the agent of the company they wanted them shipped to Norfolk, Va., where there were other camps, and it issued to them a receipt for the two boxes of tools, and told the plaintiffs that

they would arrive in Norfolk by Monday. The company had all the notice that they could have had had they examined the tools in the boxes. By the exercise of ordinary care the defendant would have known for what purpose these tools were to be used, and are therefore responsible for any loss proximately caused by their negligence and delay. *Neal v. Hardware Co.*, 122 N. C. 105, 29 S. E. 96, 65 Am. St. Rep., 697. *Lewark v. Railroad*, 137 N. C. 383, 49 S. E. 882; *Lumber Co. v. Railroad*, 151 N. C. 25, 65 S. E. 460, and cases there cited; *Rawls v. Railroad*, 173 N. C. 8, 91 S. E. 367.

"There was evidence that the plaintiffs stayed in Norfolk ten days waiting for their tools to come, and that the government required carpenters to furnish their own tools. There was evidence that they were paid by the government when they obtained their tools \$8.25 per day, which they lost, and besides they had to pay their board during their enforced idleness. It was in evidence that they were at the expense of a trip home to buy a new set of tools and return. It would seem from this that the jury must have allowed them compensation for about six days' loss of time, each, as a reasonable wait for the tools to arrive, and their board, and something possibly for the expense and loss of time returning home to get a new set of tools, and for the loss in having a double set each. These were not items of loss, but for consideration by the jury in estimating the loss.

"It is true that it was incumbent

face of the express receipt, held chargeable with notice that the serum was intended by the consignee for preventive treatment of hogs.<sup>8</sup>

**Interest on Claims.** The question as to whether interest can be recovered on a claim for loss or damage to freight is one that must be determined with reference to the laws of the state where the action is brought. In some states interest is not allowed.<sup>9</sup>

upon the plaintiffs to lessen the loss accruing from the negligence of the defendant, and this the jury seems to have considered, and the court so charged.

"The note on the bill of lading that if the goods were hidden from view the recovery for loss thereof should not exceed \$50 is not valid, for a common carrier cannot stipulate against loss by its own negligence. Moreover, such limitation applied only to the value of the tools, and for them no recovery is embraced in this verdict. The verdict covers only the loss of time and expenses, not exceeding the loss sustained while waiting a reasonable time for the arrival of the tools.

"No error."

*Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525, 526.

8. *Adams Express Co. v. Allen* (Va. 1919), 100 S. E. 473.

Damages recovered by the consignee of hog cholera serum from the express company which carried the shipment, and which was chargeable with knowledge of its intended use as a preventive, being for the loss of hogs through disease which might have been prevented but for delay in delivery, held "general" and not "special" damages, having been such as

arose naturally from the breach of the contract itself and such as may reasonably be supposed to have been in the contemplation of both parties. *Adams Express Co. v. Allen* (Va. 1919), 100 S. E. 473.

9. In an action of tort, where the damages are an uncertain quantity, depending on no fixed standard, and cannot be made certain except by verdict, interest will not be allowed. *Howell v. Lehigh Valley R. Co.* (N. J. 1920), 109 Atl. 309.

In *Howell v. Lehigh Valley R. Co.* (N. J. 1920), 109 Atl. 309, the court said:

"Lastly, it is claimed that the trial judge erred in refusing to charge the following request:

"The jury is not at liberty to allow the plaintiffs, or any of them, any interest in respect of any sum found to be due them, or any of them."

"The fire destroyed plaintiffs' sugar stored in warehouses. The quantity of sugar destroyed was not in dispute. At any rate, it was easily ascertained by simple calculation. The property had a certain market value before and at the time of the fire and its destruction. The market value was 5½ cents a pound, and therefore the exact loss was ascertainable by mere computation. To illustrate: If a quantity of that sugar had been

**Baggage.** The common-law rule is that a common carrier of passengers carries ordinary baggage of passengers as an incident to the contract of passenger carriage; and the limitation of liability to a loss of baggage exclusive of merchandise follows from the nature of the contract.<sup>10</sup> A common carrier transfer company, carrying under an independent contract a trunk coming on

sold on that day to a customer, but without a price fixed therefor, there can be no doubt that in an action to recover for the value of the sugar, even though the price and quantity be disputed by the defendant, the plaintiff would nevertheless be entitled to recover its market value at the time the sugar was sold and found to have been delivered, and, unless sold on credit, would be entitled to interest from the date of the shipment. It is to be observed that in such a case, as was done in the present, not only the value of the sugar would have been ascertained by reference to established market values, but also the quantity actually delivered, in order to ascertain the amount due to the plaintiff. There can, therefore, be no rational basis on which the allowance of interest may be made in the one case and not in the other.

"The ground upon which a recovery of interest will be disallowed is well stated by Mr. Justice Trenchard, in *Philbrick v. Mundy*, 106 Atl. at page 361, where, speaking for the Supreme Court, in commenting upon *Speer v. Vanorden*, 3 N. J. Law, 232, he says:

"That principle is applicable to an action of tort, such as the present, where the damages are an uncertain quantity, depending on no fixed standard, and cannot be made certain except by verdict."

"In the case sub judice the damages consisted of property destroyed which

had a market value, and therefore were not uncertain—there being a fixed standard by which such damages were readily ascertainable, the market value of the property at the time of its destruction.

"An examination of the other grounds of appeal relied on and argued before us proves them to be without merit."

In an action for loss of sugar in a fire alleged to have been negligently set by defendant, where the quantity of sugar destroyed was not in dispute, and had a definite market value at time of fire, so that exact loss was ascertainable by mere computation, plaintiffs were entitled to interest on amount of their damages. *Howell v. Lehigh Valley R. Co.* (N. J. 1920), 109 Atl. 309.

Properly construed, plaintiff's suit was one in tort, and a verdict for interest on the amount found was contrary to law. *Western & Atlantic Railroad Co. v. McCauley*, 68 Ga. 818. *Southern Express Co. v. Bass* (Ga. 1920), 102 S. E. 168.

In an action for injuries to a shipment of goods, where interest was not claimed on the damages from date of delivery of the damaged goods, the awarding of such interest was erroneous. *Baker v. Lyons* (Tex. 1920), 218 S. W. 1090.

10. *McQuat v. Cook's Taxicab & Transfer Co.* (Minn. 1920), 176 N. W. 763.

a train as a passenger's baggage, is responsible to the passenger for the loss of the contents of the trunk, though not all baggage as between the railway carrier and the passenger; and it cannot assert for itself the limitation of liability which runs in favor of a passenger carrier which, as an incident to the carriage of its passenger, carries his luggage.<sup>11</sup>

**Duty of Claimant to Reduce Loss.<sup>12</sup>**

11. *McQuat v. Cook's Taxicab & Transfer Co.* (Minn. 1920), 176 N. W. 763.

*American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

12. It was incumbent upon plaintiff shippers to lessen the loss accruing from negligence of express company which engaged to transport plaintiffs' carpenters' tools. *Pendergraph v.*

A failure or inability on the part of the shipper to convert into money partially damaged eggs would not affect the defendant's right to have credit for their value. *Southern Express Co. v. Bass* (Ga. 1920), 102 S. E. 168.

## CHAPTER IX.

### ACTIONS AT LAW FOR DAMAGES

**Jurisdiction of Courts.** A purchaser of potatoes from a resident of Georgia, who gave the agent for the carrier at destination in South Carolina a certified check for the amount of draft attached to the bill of lading by the seller and forwarded to a bank, but delayed, could not, in his action against the seller for damages, attach the check in the hands of the carrier's agent as the property of the seller, as it was deposited to protect the carrier.<sup>1</sup>

**Parties.** Where a shipper of goods by rail draws a draft on the consignee in favor of a bank, and surrenders the bill of lading to the bank, and receives credit from the bank for the value of the draft, and the draft with the bill of lading attached is forwarded by the bank to its local banking correspondent at the place where the goods are to be delivered, and the consignee receives the bill of lading upon payment of the draft, and thereby obtains possession of the goods, it is held that no garnishable interest of the shipper remained in the proceeds of the draft in the hands of the local banking correspondent, as the title to the goods had passed, either absolutely or as security, to the bank which extended credit thereon to the shipper; and this rule is unaffected by any question whether the shipper had checked against the credit given to him for the draft and bill of lading.<sup>2</sup>

1. *Cleveland v. Cannady* (S. Car. 1919), 100 S. E. 147.

Carpenters injured by an express company's failure to transport their tools as agreed could elect to bring an action in tort in the superior court for over \$200, or on contract for \$200 in Justice's court. *Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

2. *Lampl v. Hawkins* (Kans. 1920), 188 Pac. 233.

A consignor in Idaho shipped certain carloads of potatoes to consignees in Wichita. At the same time he drew drafts on the consignees in favor of his home bank in Idaho and surrendered to it the bills of lading for the potatoes. The bank gave him a credit on his checking account in considera-

Where a bank acquires title to a draft with bill of lading attached by crediting the amount to the consignor's account, and the consignee pays the draft, being compelled to do so before receive-

tion thereof, and forwarded the drafts with the bills of lading attached to a bank in Wichita. The consignees paid the drafts, and the bills of lading were surrendered to them. Pursuant thereto the railway carrier delivered the potatoes to the consignees. There was a shortage in quantity and defect in the quality of the potatoes. The consignees garnished the proceeds of the drafts while the money was still in the hands of the Wichita bank. The Idaho bank intervened. Held that no garnishable interest in the money remained in the shipper; it belonged to the Idaho bank; and it is immaterial whether the consignor had checked against his deposit account in his home bank or not. *Lampl v. Hawkins* (Kans. 1920), 188 Pac. 233.

Objection that insurer cannot join with insured in action against tort-feasor under provision of policy, because of alleged waiver thereof, will not be considered on appeal, where tort-feasor did not plead such waiver, and where entire case has been tried out on its merits. *Howell v. Lehigh Valley R. Co.* (N. J. 1920), 109 Atl. 309.

An equitable petition was filed in the superior court of Chatham county Ga., by a manufacturer of naval stores residing in Liberty county, Ga., against a bank in Savannah, Ga., and a railroad company and a tanking company and the sheriff of the county. Among other things, the following was alleged in substance: Plaintiff, in the course of his dealing with a factor in the city of Savannah, consigned certain rosin and spirits of

turpentine over the lines of the defendant railroad company to the factor to whom bills of lading were sent. The factor was directed to "tank" the spirits of turpentine and hold that and the rosin for petitioner. The factor "tanked" the spirits of turpentine and received receipts from the tanking company therefor, and without plaintiff's knowledge or consent transferred both the rosin and spirits of turpentine to the bank as collateral security for his individual debt by assigning the bills of lading and tank receipts. The bank had notice that in attempting to secure a loan on rosin and spirits of turpentine the factor was acting as an agent and not as an owner of the property, and the bank did not, by reason of the transfer to it, acquire any title to or interest in the rosin and spirits of turpentine, except in subordination to petitioner's title. The bank instituted bail trover suits in the city court of Savannah against the tanking company for the spirits of turpentine and the railroad company for the rosin, and the sheriff was about to take possession of the property. Plaintiff owed the factor a stated amount on account of advancements made on the consignments, which amount he "is ready, able, and willing to pay \* \* \* at any time on the surrender to him of" the spirits of turpentine and rosin. The prayers were for injunction, etc., and that plaintiff's title to the property be set up by decree of the court, and that possession thereof be surrendered to him. The factor was not made a party to the suit. The bank demurred on general and special

ing the bill of lading by the United States Food Administration, and the shipment is not as guaranteed, and a judgment is obtained against the consignor, the consignee cannot recover the

grounds and answered. The demurrer as amended was overruled. The case was submitted to a jury, and a verdict returned as follows: "We, the jury, find that the plaintiff is the true owner of the described personal property, subject to the payment of (\$938.41) to the Producers' Naval Stores Company (the factor) and to such further amounts as may be due by McQueen to the Atlantic Coast Line Railroad Company and the National Tank & Export Company for their charges on all said goods, and that the Savannah Bank & Trust Company be perpetually enjoined from prosecuting its suit in the city court of Savannah against the Atlantic Coast Line Railroad Company and the National Tank & Export Company." Upon this verdict a decree was rendered. The bank excepted to the judgment overruling the demurrer and to the decree based on the verdict and to the judgment denying a motion for new trial. Held: The petition alleged a cause of action against the bank and was not subject to general demurrer or any of the grounds of special demurrer. First National Bank of Macon v. Nelson, 38 Ga. 391, 95 Am. Dec. 400 (1); Seago v. Pomeroy, 46 Ga. 227, 231; Cummings v. McDade, 118 Ga. 614, 45 S. E. 479. There was no special demurrer on the ground that there was no absolute tender of the amount admitted to be due the factor, and no ruling is made on the question of whether such a tender was necessary. The request to overrule on review the case of Bank of Macon v. Nelson, 38 Ga.

391, 95 Am. Dec. 400, is denied. Savannah Bank & Trust Co. v. McQueen (Ga. 1919), 100 S. E. 33. The judge charged: "The bank further contends that, under a custom alleged to be generally recognized as prevailing in the city of Savannah, the factor had the right to pledge the rosin and spirits. I charge you that, if McQueen (the plaintiff) were a nonresident of Savannah at the time the goods were consigned to the factor, the alleged custom would not become, by implication, a part of the contract between the consignor and the consignee, unless there is proof that the custom alleged to prevail in Savannah was known to McQueen. If you find that the custom alleged is a mere local custom or business usage in a particular city, it is not binding except upon those who have recognized it in their dealings. The custom of the business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became, by implication, a part of the contract." Held, that the charge was not erroneous on the ground that the jury was instructed that the alleged custom would not be binding upon McQueen unless he had actual knowledge of it. Bacon Fruit Co. v. Blessing, 122 Ga. 369, 50 S. E. 139; McCall v. Herrin, 118 Ga. 522, 45 S. E. 442; Hendricks v. Middlebrooks, 118 Ga. 137, 44 S. E. 835; Horan v. Strachan, 86 Ga. 416, 12 S. E. 678, 22 Am. St. Rep. 471; Miller v. Moore, 83 Ga. 692, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; American Sugar Co. v. McGhee,

amount of damages due him in a garnishment against the bank.<sup>3</sup> Where goods are shipped on open bills of lading, so that title passes, but the price of the goods to the consignee is docked the amount of any loss or damage, the adjustment amounts to an equitable assignment to the consignor of the consignee's right to recover of the carrier.<sup>4</sup> Where a bill of lading for a shipment of tools was issued by an express company in the name of one of the shippers alone, the agent knowing the tools belonged to both, so that the bill of lading was to one for himself and as agent for the other, and both brought action for failure to transport the tools, if one of them was an unnecessary party plaintiff, his being so was a mere matter of surplusage.<sup>5</sup> A bailee may

96 Ga. 27, 21 S. E. 383 (2); *Kelly v. Kauffman*, 92 Ga. 105, 18 S. E. 363 (3); *Chateaugay Ore Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; *Clark on Contracts* (3d Ed.) 496, § 217; 17 *Corpus Juris*, 454, § 15. The request to review and overrule the Georgia decision just cited is denied. *Savannah Bank & Trust Co. v. McQueen* (Ga. 1919), 100 S. E. 33.

Construing the verdict in the light of the pleadings, the factor (the Producers' Naval Stores Company) not being a party, and the petition against the bank alleging a willingness to pay the amount admitted to be due the factor upon surrender of the goods, the requirement of the verdict that plaintiff should pay to the Producers' Naval Stores Company a stated sum as a condition to his recovery is to be construed as requiring such payment to be made to the bank. *Savannah Bank & Trust Co. v. McQueen* (Ga. 1919), 100 S. E. 33.

The plaintiff in error having procured a substantial modification of the judgment of the trial court, it is ordered that he recover the costs. *Savannah Bank & Trust Co. v. McQueen* (Ga. 1919), 100 S. E. 33.

3. *F. A. Kadane & Co. v. Security Nat. Bank* (Tex. 1920), 219 S. W. 506.

4. *Produce Trading Co. v. Norfolk Southern R. Co.* (N. C. 1919), 100 S. E. 316.

5. *Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

In *Lewis v. American Railway Express Co.*, 180 N. Y. S. 751, the court said:

"Plaintiff sues the defendant to recover the value of several articles of merchandise given by him to the defendant for transportation and delivery to certain consignees and lost in transit. The defendant denies liability. Plaintiff, a wholesale dealer in butter, cheese, and eggs, received orders from out of town customers for the sale and delivery of this kind of goods. The orders were received through salesmen or by mail. When the goods were ready for transportation, an agent of the defendant took up the parcels and signed for them in a general express receipt book kept by plaintiff. The several receipts contained the nature and quantity of the article, the name of the consignee

and city or town where delivery was to be made. This book also contained a form of special contract which limited the defendant's liability in case of loss to \$50, unless a greater value was declared at the time of delivery to the defendant for transportation. In making the shipments no valuation was stated. Plaintiff gave proof of the receipt of the orders from the customers, the delivery of the parcels to defendant's agent, his signature in the express receipt book, the failure to deliver, and the reasonable value of the articles lost. The defendant rested its case, without offering any proof, and moved to dismiss on the ground 'that plaintiff failed to prove a case, that the title to the goods on delivery to the defendant for transportation was vested in the consignees, and they were the proper parties to sue.'

"The general rule is that in a contract to sell, or sale, there is a presumption that delivery to a carrier is delivery to the buyer. Personal Property Law (Consol. Laws, c. 41) § 127, subd. 1, as amended by Laws 1911, c. 571; *Krulder v. Ellison*, 47 N. Y. 37, 7 Am. Rep. 402; *Levy v. Weir*, 38 Misc. Rep. 361, 77 N. Y. Supp. 917; *Wertheimer v. Wells Fargo & Co.* (Sup.) 112 N. Y. Supp. 1063. But this rule submits to exceptions, if a contrary intent be shown. Personal Property Law, *supra*, §§ 120 and 127, subd. 1; *Fein v. Weir*, 129 App. Div. 299, 114 N. Y. Supp. 426, affirmed 199 N. Y. 540, 92 N. E. 1084. By acceptance of the orders and in consummation of the sales the plaintiff was empowered to send and deliver the articles to the buyers at the city or town indicated, either through the agency of a carrier or otherwise, so that the rule which presumes title in

the consignee upon delivery to the carrier would govern, unless the proof and the surrounding circumstances show a contrary intention and bring this case within the rule of exceptions.

"The immediate and vital question of this litigation is therefore presented: What was the intent between the plaintiff and buyer? A careful examination of the record in this case, and of the authorities, including those relied on by the defendant, forces the conclusion that the rule asserted by the defendant does not control this case. Section 99, Personal Property Law, provides:

"1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.'

"In contracts to sell the kind of articles there ordered (foodstuffs) there is an implied warranty that the article shipped is such as is ordered and is wholesome. Section 96, subd. 2, Personal Property Law; *Burch v. Spencer*, 15 Hun, 504. Especially so where the buyer has not previously selected or inspected the articles shipped. Personal Property Law, § 128, subs. 1 and 2.

"In the present case the buyers, not having made a selection or inspection, cannot be charged with acceptance, in the absence of an agreement to the contrary. *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; *Plumb v. Bridge*, 128

maintain a right of action for loss or damage resulting from injury to his right of possession or other special property right in the property bailed.<sup>6</sup>

App. Div. 651, 113 N. Y. Supp. 92; *Imperial Products Co. v. Capital Chemicals Co.*, 187 App. Div. 599, 176 N. Y. Supp. 49. The buyers gave no orders or instructions as to the method or route of transportation. Delivery was to be made to them at the places designated. See *Personal Property Law*, § 100, rule 5. No precautions were taken by the plaintiff to safeguard the rights of the buyers, either by way of insurance on the articles ordered or a declaration of the true value in case of a loss in transit. The articles not having been delivered, the buyers had a right to treat the deliveries to the defendant as no delivery binding upon them. *Personal Property Law*, § 100, rule 5, and section 127, subds. 2 and 3; *Miller v. Harvey*, 221 N. Y. 54, 116 N. E. 781, L. R. A. 1917F, 559, affirming 83 Misc. Rep. 59, 144 N. Y. Supp. 624.

"The consignees have made no claim upon the defendant's failure to deliver. From their attitude, under the circumstances, it must be assumed they elected to treat the deliveries to the defendant as not binding on them. *Miller v. Harvey*, supra. If the buyers could treat the deliveries to the defendant as not binding on them, upon what theory could the latter enforce such an obligation? A recovery by the plaintiff would bar an action by the consignees. *Green v. Clarke*, 12 N. Y. 343. Plaintiff is possessed of the right to maintain this action. *Thompson v. Fargo*, 49 N. Y. 188, 10 Am. Rep. 342; *Miller v. Harvey*, 83 Misc. Rep. 59, on page 62, 144 N. Y. Supp. 624; *Hautman v. Miller*, 94

Misc. Rep. 266, 157 N. Y. Supp. 1104.

"The only other question to be considered is that of damages. Although plaintiff has submitted proof of the actual value of the goods lost, he is bound by the rule of law that a shipper is bound by a special contract limiting the amount of a recovery in case of loss. *Boyle v. Bush Terminal Co.*, 210 N. Y. 389, 104 N. E. 933; *D'Utassy v. Barrett*, 219 N. Y. 420, 114 N. E. 786, affirming 171 App. Div. 772, 157 N. Y. Supp. 916. In view of the terms printed upon the shipping receipt book and the fact that the plaintiff failed to declare a value, his right of recovery must be limited, not to exceed \$50 on each shipment. *D'Utassy v. Barrett*, supra; *Noel v. Westcott*, 95 Misc. Rep. 154, 158 N. Y. Supp. 702; *Foster v. Taylor*, 171 App. Div. 511, 157 N. Y. Supp. 571.

"As several of the shipments embraced more than one article, and only a part lost, the rule of limitation must be pro rata. For these reasons I am forced to deny defendant's motion for judgment. Judgment for the plaintiff in the sum of \$366.75 in action No. 1, and for \$413.35 in action No. 2."

6. *Marietta Ice & Coal Co. v. Western & A. R. Co.* (Ga. 1920), 102 S. E. 182.

A bailee, who is entitled to the possession of the property bailed, has such a special interest therein as entitles him to maintain in his own name a suit against a third party for the loss or destruction of the property.

**Pleading.** Though a petition stated a good cause of action, it may be subject to motion to make more definite and certain, if indefinite and uncertain in its averments.<sup>7</sup> A demurrer to affirmative defenses admits the facts set out in such defenses.<sup>8</sup> Where, in an action for damages to an interstate shipment of live stock, the jury might fairly have inferred from the evidence that the damage was caused by defendant's negligent failure to feed and water the stock during their journey, the court was bound to so conclude on demurrer to the evidence.<sup>9</sup> Where defendants in their answer described themselves as receivers of the respective railroads, such answers were admissions that defendants were receivers at the time the answers were filed.<sup>10</sup> A complaint stating that plaintiff's agents delivered to a carrier for shipment certain watermelons to be delivered to a company upon presentation of the bill of lading, and that defendant carrier failed to report such company's refusal to accept a part of the melons until after they were spoiled, and asking damages because the claim had not been paid or rejected within ninety days as required by statute, held to show that plaintiff was one of the

Such recovery, however, is for the use or benefit of the owner. *Schley v. Lyon*, 6 Ga. 530 (5), 537, 538, and cases there cited; 6 C. J. 1194; *Van Zile on Bailments & Carriers* (2d Ed.) §57; *Schouler on Bailments* (1st Ed.) pp. 151, 152; *United States v. Atlantic Coast Line R. R. Co.* (D. C.) 206 Fed. 190, 202, 203. The fact that the bailee has paid the bailor the value of the property destroyed does not affect the right of action against the tort-feasor. *Cornell Steamboat Co. v. Jersey City*, 51 Fed. 527, 2 C. C. A. 365. *Marietta Ice & Coal Co. v. Western & A. R. Co.* (Ga. 1920), 102 S. E. 182.

A bailee of a mule for hire, who has the possession of the animal under the contract of bailment from day to day, but returns it every night to the owner for keeping overnight, has such a special interest in the bailment as entitles him to maintain a suit

against a third party for the animal's death. In such a suit the bailee may recover the full value of the animal for the use of the owner, and also, for his own use, any damage to his right of possession, or to his special property right, including expenses incurred by him for medical treatment to the animal made necessary by the injuries resulting from the tortious act of the defendant. *Marietta Ice & Coal Co. v. Western & A. R. Co.* (Ga. 1920), 102 S. E. 182.

7. *Browning v. Wells Fargo & Co. Express* (Mo. 1920), 219 S. W. 665.

8. *Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co.* (Wash. 1920), 186 Pac. 852.

9. *Southern Ry. Co. v. Finley & Seymour* (Va. 1920), 102 S. E. 559.

10. *Baker v. Lyons* (Tex. 1920), 218 S. W. 1090.

class of persons entitled to recover under the state law, being the owner of the melons which were shipped through his agents, and that the claim was not fictitious, and was by one having dealings with the carrier.<sup>11</sup>

**Burden of Proof.** Where loss in weight of live stock is claimed as a result of delay in starting a shipment which arrived at its destination within a reasonable time after loading, the burden is upon the shipper to show that upon its arrival at the point of destination it weighed less than it would have weighed if the delay had not occurred.<sup>12</sup> In order to recover damages for

11. *Clift v. Southern Ry. Co.* (Ind. 1919), 124 N. E. 457.

Where a shipper's complaint for damage to shipment is based on unreasonable delay in transportation, recovery could not be had on ground of negligence in failing to properly heat car and take necessary precaution against freezing of shipment. *Rezsek v. Southren Pac. Co.*, 181 N. Y. S. 117.

12. *Gray v. Oregon Short Line R. Co.* (Idaho, 1920), 187 Pac. 540.

In an action against a carrier for loss of goods, where petition alleged delivery to the carrier and answer denied such delivery and set out in detail the circumstances under which the bill of lading was issued, the facts so alleged in the answer were not to be taken as confessed, in default of reply, under the state law, requiring reply to any "special matter of defense"; for such provision was intended to apply only to facts not already in issue by allegations of the petition, and alleging affirmatively the converse of what plaintiff has alleged amounts merely to a denial and not "special matter of defense." *Brass v. Texarkana & Ft. Smith Ry. Co.* (Tex. 1920), 218 S. W. 1040.

In view of Revisal 1905, § 1463, as

to sufficiency of pleading in justice court, section 1467 as to disregard of form and right to amend in such court, and sections 495, 505, 507, 509, 512, abolishing refinements of pleading and requiring liberal construction, complaint in justice court for a certain amount "due by goods lost on the company's road" is sufficient to cover the freight paid, as well as the goods, especially where defendant had long had plaintiff's itemized statement, filed with claim, and never asked for bills of particulars or an amendment of complaint to make it more certain, as authorized by sections 494, 496. *Aman v. Dover & Southbound R. Co.* (N. C. 1920), 102 S. E. 392.

Under Revisal 1905, § 1476, on appeal from a justice of the peace, the superior court had plenary power to allow any necessary amendment in an action against a carrier for failure to transport and deliver, where, before trial, the goods were found and delivered. *Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

In *Browning v. Wells Fargo & Co. Express* (Mo. 1920), 219 S. W. 665, the court said:

"The amended petition upon which

an alleged delay in the shipment of freight, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the

this case was determined, after an averment of the incorporation of defendant, proceeds:

"Plaintiff states that on the 25th day of September, 1915, he was the owner and delivered to the defendant and the defendant received, one Berkshire male hog, known as "Symboleer's Goods 209000," and agreed, for and in consideration of certain freight charges paid or to be paid to it, well and safely to carry the same from Jackson, in the State of Missouri, to Sedalia, in the State of Missouri, and at the latter place to deliver said hog to plaintiff in as good condition as when received by it.

"Plaintiff states that the defendant in violation of its said agreement and in total disregard of its duty as a common carrier aforesaid, failed to deliver said hog at destination in good condition, but so carelessly and negligently conducted itself in the premises that said hog was dead when delivered at destination.

"Plaintiff further states that the said hog was of the value of five hundred dollars, for which sum, with his costs, he prays judgment."

"To this petition defendant filed a motion to make it more definite and certain, which motion, after quoting the charging part of the petition, assigns three grounds, as follows:

"1. Said averment fails to specify any act or acts of the defendant which plaintiff complains of as negligence.

"2. The said averment does not advise the defendant what he is called upon to defend against.

"3. The acts which plaintiff intends to show were negligently done should be set forth in the amended petition with a reasonable degree of particularity, so that the defendant may prepare to meet plaintiff's charge of negligence."

"The court sustained the motion and plaintiff declining to plead further, judgment was entered dismissing the case. Moving to set this aside and that being overruled, plaintiff has duly appealed, assigning error to the action of the court in sustaining the motion and dismissing the cause.

"In many cases our courts have held that a general charge of negligence against a carrier is good. For illustrations typical of many others, see *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. 965; *Lachner Bros. v. Adams Express Co.*, 72 Mo. App. 13, and cases cited at page 17; *Cash v. Wabash R. Co.*, 81 Mo. App. 109. See further *Cunningham v. Wabash R. Co.*, 167 Mo. App. 273, 149 S. W. 1151; *Winslow v. Chicago & A. R. Co.*, 170 Mo. App. 617, 157 S. W. 96; *Kolkmeyer v. Chicago & A. R. Co.*, 192 Mo. App. 188, 182 S. W. 794.

"It is true that the petition may set out a good cause of action against the carrier of live stock; still, if it is uncertain and indefinite in its averments, it may be attacked by a motion made in apt time for those defects. *MacAdam v. Scudder*, 127 Mo. 345, 30 S. W. 168. We think the petition here is not subject to that attack. When the plaintiff alleged the loading of the hog in good condition and

place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose.<sup>13</sup> While plaintiffs have the burden of proving that the negligence alleged was the proximate cause of the loss, they are not required to make out all of the specifications of negligence pleaded, and can recover upon proof that defendants were negligent according to any one or more specifications, and that such negligence was the proximate cause of the loss.<sup>14</sup> A showing by the shipper of the receipt by a carrier of goods in good condition, and delivery in bad condition, is a *prima facie* showing that such carrier has failed in his common-law duty to bring the shipment safely through at all hazards, save the act of God, the public enemy, or the inherent nature of the freight, and, to escape liability, the carrier must show that the shipment falls within

its delivery in a damaged condition, he stated a cause of action with sufficient certainty, and the petition was not open to attack as indefinite and uncertain. What the proof may develop is a matter not before us.

"Learned counsel for defendant have embodied in their statement abandoned pleadings. It does not appear that they were introduced in evidence or called for by the bill of exceptions and we cannot notice them. *Fidelity Loan Securities Co. v. Moore*, not yet officially reported, but see (Sup.) 217 S. W. 286.

"If it is claimed there was a departure by the plaintiff, that point is not presented in such manner as to enable us to notice it.

"The judgment of the circuit court is reversed and the cause remanded."

Plaintiff's petition, alleging the loading of a hog in good condition for transportation by defendant express company to a fixed destination and delivery of the hog dead, is not only sufficient to state a cause of action, but is sufficiently definite and

certain, so as not to be subject to a motion to make more definite and certain. *Browning v. Wells Fargo & Co. Express* (Mo. 1920), 219 S. W. 665.

13. *Lusk v. Durant Nursery Co.* (Okla. 1920), 188 Pac. 104.

A shipment of freight under contract with a carrier for shipment, not only over its own line, but also a connecting line, in an action by the consignor against the delivering carrier, where the evidence disclosed that the initial carrier had issued a receipt to the consignor to the effect that the goods were received by it "in apparent good order," the burden of proof was on the carrier to rebut said *prima facie* presumption of delivery "in apparent good order," or to show that the alleged damages or negligence in delay for said shipment occurred before it reached the delivering carrier line. *Lusk v. Durant Nursery Co.* (Okla. 1920), 188 Pac. 104.

14. *Howell v. Lehigh Valley R. Co.* (N. J. 1920), 109 Atl. 309.

one of the exceptions.<sup>15</sup> Where a shipper undertakes to load and count the goods, the carriers' burden of proof is shifted, and the shipper must affirmatively show his damage.<sup>16</sup>

**Competency of Witnesses.** In an action for damages to a shipment of live stock due to rough handling and exposure to the weather, a stockman of several years' experience, testifying that in his opinion the cattle were not too weak to ship, held qualified

15. *Singer v. American Express Co.* (Mo. 1920), 219 S. W. 662.

This was a suit to recover the value of an alleged shortage in a carload shipment of rags; the shortage being the difference in the alleged weight of the rags at the time of their delivery to the defendant carrier and the weight of the rags when delivered to the consignee. In this case there was no presumption against the railroad company, but the plaintiff had the burden of affirmatively proving his case. The evidence as to how many pounds or rags were actually loaded in the car is too vague and uncertain to support a recovery for the plaintiff, and the court erred in overruling the motion for a new trial. *Louisville & N. R. Co. v. Stewart* (Ga. 1919), 100 S. E. 22.

Evidence that a railroad train crew failed to stop the leakage from an oil tank car, although it might easily have been done by unscrewing a dome cap on top of the tank and adjusting the valve, held to establish the railroad's negligence, especially as one of the crew had previously been such an adjustment made. *Southern Cotton Oil Co. v. New Orleans & N. E. R. Co.* (La. 1920), 83 So. 821.

Evidence of receipt of goods by carrier for transportation and loss therefore held sufficient to take the case to the jury. *Aman v. Dover &*

*Southbound R. Co.* (N. C. 1920), 102 S. E. 392.

16. *Produce Trading Co. v. Norfolk Southern R. Co.* (N. C. 1919), 100 S. E. 316.

When an interstate carrier receives for transportation live stock in good condition unaccompanied by the owner or his agent, and delivers it in damaged or bad condition, the burden of proof as to the cause of the damage is on the carrier. *Southern Ry. Co. v. Finley & Seymour* (Va. 1920), 102 S. E. 559.

In an action for injuries to shipment of household goods, testimony that the goods were delivered by warehousemen to initial carrier in good order, coupled with a bill of lading acknowledging receipt of the goods apparently in good order, was sufficient to show delivery to initial carrier in good order. *Baker v. Lyons* (Tex. 1920), 218 S. W. 1090.

In an action against a railway for damage to live stock through delay in transit and rough handling, evidence as to whether or not there was any delay held insufficient to sustain verdict for plaintiffs; the testimony of all trainmen who handled the shipment, supported by their records, tending to show that it was handled with due dispatch. *Panhandle & S. F. Ry. Co. v. Arnett* (Tex. 1920), 219 S. W. 232.

as an expert.<sup>17</sup> In an action against a railway for damages to a shipment of live stock from delay in transit and rough handling, the weights of the cattle should have been shown, if possible, by more certain evidence than the opinion of a plaintiff, one of the shippers, as to what shrinkage would occur on a usual run, and what on delay, though such opinion testimony sustained a verdict for the plaintiffs.<sup>18</sup>

**Admissibility of Evidence.** Notes of telephonic communications are competent evidence, if the recollection of the person who made them would not enable him to testify to the facts, and his recollection could not be refreshed thereby so as to enable him to testify to the facts, on proof that they were made by such person truthfully and accurately at the time.<sup>19</sup> Where testimony was not designed to prove the contents of an original message as delivered to telegraph company by sender, but to show what was written in the copy received by the addressee, the proffer was deficient; the copy itself not being admissible as secondary evidence except upon proof that it was a correct transcript of the message actually authorized by the alleged sender.<sup>20</sup> Reply letters from a corporation, received by due course of mail, purporting to come in answer to prior letters to the corporation, require no authentication.<sup>21</sup> In an action against a carrier for damages to a shipment of live stock, evidence by the

17. *Cravens v. Hines* (Mo. 1920), 218 S. W. 912 (state shipment).

18. *Panhandle & S. F. Ry. Co. v. Arnett* (Tex. 1920), 219 S. W. 232.

19. *Phoenix Coal Co. v. Pennsylvania R. Co.*, 180 N. Y. S. 283.

It was error to exclude from the evidence requisitions, consisting of blank forms filled out by the party offering the same from telephonic communications, on the ground that such evidence was immaterial, although the requisitions as offered were not competent, where the evidence was material and might have been made competent, if the court had not so ruled. *Phoenix Coal Co.*

*v. Pennsylvania R. Co.*, 180 N. Y. S. 283.

Such reply letters, relating to the loss of a shipment by an express company, requesting copies of express receipts and invoice, and the submission of a statement charging the shipment to the company, are sufficient to go to the jury on the question of nondelivery. *Todd Protectograph Co. v. Wells Fargo & Co. Express*, 181 N. Y. S. 128.

20. *American Fidelity Company of Montpelier v. State* (Md. 1919), 109 Atl. 99.

21. *Todd Protectograph Co. v.*

plaintiff that the cattle were in better condition when starting on the journey than they were when brought from another point to the point of shipment was not inadmissible; the carrier's defense being that the cattle were so poor and emaciated that

Wells Fargo & Co. Express, 181 N. Y. S. 128.

In *Todd Protectograph Co. v. Wells Fargo & Co. Express*, 181 N. Y. S. 128, the court said, p. 129:

"The letters of the defendant, objected to upon the trial, were properly received. They were reply letters, and in such a case the rule is that the 'arrival by mail of a reply, purporting to be from the addressee of a prior letter, duly addressed and mailed, are sufficient evidence of the replies' genuineness to go to the jury." *Wigmore on Ev.* § 153; *Greenleaf on Ev.* vol. 1, § 575c; *Wharton on Ev.* § 1328; 17 *Cyc.* 411; 20 *Cent. Dig.* col. 2331; 8 *First Decennial Digest*, p. 1104. Where a letter is not a reply letter, it must be authenticated, whether it be from an individual or from a corporation; but where it is a letter received by due course of mail, purporting to come in answer from the party to whom a prior letter had been sent, no authentication is necessary. This rule is required in the interest of convenience and simplicity in legal procedure and the reasonable transaction of complex business relations. A reply letter thus presented furnishes *prima facie* evidence sufficient to go to the jury, which the opposing party must meet, or accept the conclusion of the jury thereon.

"There was no direct proof of non-delivery of the package shipped from Rochester, but this fact may be established by indirect evidence. On November 27, 1917, the plaintiff wrote

the defendant, asking it to trace and show delivery of the shipment, and stated that the letter would constitute its claim in case of loss. No reply having been received, the plaintiff on December 20, 1917, wrote the defendant again, requesting it to trace and show delivery of the shipment. Not having received a reply, the plaintiff on January 23, 1918, wrote the defendant, urging upon it the necessity of tracing the shipment at once, and saying that it expected a reply within 10 days. Not hearing from the defendant, the plaintiff on March 6, 1918, wrote the defendant, saying that, not having received replies to its former communications, it had decided to enter a formal claim, and inclosed a bill for the shipment. This letter brought a reply from the defendant's agent, dated March 11, 1918, asking that it be furnished with a certified copy of the original invoice and a copy of the express receipt, returning all papers 'promptly' for further investigation. The plaintiff on March 16, 1918, sent a letter to the defendant, inclosing express receipt and certified copy of the original invoice, as requested in defendant's letter of March 11th. The defendant's agent on March 26, 1918, wrote the plaintiff, asking it to 'please furnish us with statement charging this shipment to this company.' On April 3, 1918, the plaintiff sent a letter to the defendant, as requested in a prior communication, charging the shipment to the defendant. The only inference that can be drawn from

they were not physically strong enough to endure the shipment.<sup>22</sup> In order to introduce account sales as a record, it is necessary to show by the entrant that he made the entries in the usual course of business, and the performance of his duty contemporaneously with the transaction recorded, and that it was correctly entered.<sup>23</sup>

these letters is that the machine had not been delivered. After the case was closed, and the defendant omitted to show the authority of the person writing the letters, or to prove a delivery, the jury was justified in drawing such reasonable inferences as the evidence before them warranted. *Wylde v. Norther R. R. Co. of N. J.*, 53 N. Y. 156; *Dowling v. Hastings*, 211 N. Y. 199, 202, 105 N. E. 194. The letters and conduct of the defendant are sufficient to lead any reasonable man to believe that the goods had not been delivered, and therefore sufficient to submit to the jury upon the question of nondelivery. No direct evidence or positive admission by defendant was necessary, but only such evidence as would be sufficient for a reasonable man to draw a conclusion of nondelivery."

In a suit by a railroad, through the federal Director General, to enjoin an express shipper from placing shipments on board trains after termination of its contract by the road, evidence as to the rules and regulations in force on another railroad system was rightly excluded as immaterial to the issues. *Director General of Railroads v. People's Express* (Mass. 1920), 126 N. E. 417.

22. *Cravens v. Hines* (Mo. 1920), 218 S. W. 912 (state shipment).

In an action for damages to a shipment of live stock, evidence as to the condition of the cattle prior to shipment was not incompetent, notwith-

standing that there was no allegation in the complaint that the cattle were in good condition when received for shipment; defendants having raised the issue in the answer. *Cravens v. Hines* (Mo. 1920), 218 S. W. 912 (state shipment).

In an action for damage to a shipment of live stock because of rough handling and severe weather, it was not error to exclude the shipping contract whereby the shipper assumed all risk and expense of feeding, watering and caring for the shipment, in effect shipping the cattle at his own risk, in view of *Laws* 1911, p. 153, providing that no carrier can by contract exempt itself from liability as a common carrier. *Cravens v. Hines* (Mo. 1920), 218 S. W. 912 (state shipment).

23. *Panhandle & S. F. Ry. Co. v. Arnett* (Tex. 1920), 219 S. W. 232.

In an action against a railway for damages to cattle from delay and rough handling, error in admitting in evidence account sales by the two salesmen who sold the cattle for the commission company to which they were consigned was harmless, where the court instructed the jury they could not consider the evidence as showing the weight of the cattle, if there was evidence from which the jury could calculate their weight without the account sales. *Panhandle & S. F. Ry. Co. v. Arnett* (Tex. 1920), 219 S. W. 232. In this case the court said:

Where evidence, part of which was inadmissible and part admissible, was offered as a whole, the exclusion of the whole was not

"Assignments 1 to 5, inclusive, assert the court was in error in admitting the account sales attached to the deposition of C. M. Adams, and referred to by C. L. Lebow in his deposition as giving the weight, number, etc., of the cattle. The objection is to that part of the account giving the weight of the cattle. These two witnesses, it appears, were salesmen who sold the cattle for the commission company—100 head July 19th, 8 head July 20th, and 22 head July 24th. While these witnesses testify the account sales attached to the depositions were correct as to weight, prices, number, and in so far as they go, neither show they made the entries from which the account sales is taken. The trial court, in his general charge to the jury, directed them to disregard the account sales as to weight of the cattle, and if the jury did so it will obviate the objections made. In order to introduce account sales as a record, we think it necessary to show by the entrant that he made them in the usual course of business and in the performance of his duty, contemporaneously with the transaction recorded, and that it was correctly entered. *Railway Co. v. Leggett*, 44 Tex. Civ. App. 296, 99 S. W. 176; *Randle v. Barden*, 164 S. W. 1063; *Schaff v. Holmes*, 215 S. W. 864. If the party has an independent recollection as to any matter contained in the account of sales, of course he could testify thereto the same as to any other fact; or, if an account or memorandum was made by another or by himself, perhaps he could use it to refresh his mem-

ory; but a general statement by one who is not charged with keeping the record, or with any special oversight of the records, we do not think should be held to be a sufficient predicate for its admission. *Railway Co. v. Cauble*, 41 Tex. Civ. App. 348, 91 S. W. 214.

"It is held records of this kind are not admitted under the shop-book rule. It has occurred to us, however, that in making up the books of original entry if the entrant should make such entries from tickets of the weights and prices and number of cattle, or the like, reported to him in the usual and ordinary course of business, it would not be required to produce the weigher, with his tickets or stubs, or salesmen, to show prices, weights, numbers, etc.; that perhaps to that extent the shop-book rule should obtain in the establishment of records of this kind, if otherwise necessary preliminary evidence is offered. It has been said that the former strict rules are not followed.

"'Inasmuch as under modern methods of extensive business houses the information relative to the transaction constituting the account must pass through various hands before being permanently recorded, some system of temporary memoranda, preparatory to the permanent records, is necessary to insure correctness as well as accuracy.' *Jones on Evidence*, Vol. 3, §519; *Scruggs v. Woodley*, 179 S. W. 897.

"However, there appears to be a different rule in making up books or records other than those of shopkeepers in this state, at least in some

error.<sup>24</sup> In an action of trespass on the case, defendant may, with few exceptions, prove under the general issue matters in confession and avoidance.<sup>25</sup>

**Judicial Notice.** The courts take judicial notice of state lines and the location of points within the state.<sup>26</sup> The courts judicially know that the Director General of Railroads was on January 10, 1918, operating the Missouri Pacific Railway.<sup>27</sup> A court cannot blind its eyes to knowledge of a fact notorious throughout its jurisdiction, as that cotton marketed in Texas in any year

instances, to which the rules will not be applied. *Railway Co. v. Johnson*, 7 S. W. 838; *Cathey v. Railway Co.*, 104 Tex. 39, 133 S. W. 417, 33 L. R. A. (N. S.) 103. In the interest of economy and convenience, it seems to us that if the party making the entry produce and establish the entry was made in the usual course of business by one whose duty it was to make it, contemporaneously with the transaction recorded, and that it was correctly made, the account ought to be admitted, as the party who makes the record is not a party at interest in the suit, and the record is in a sense against himself and part of the *res gestæ*. The record itself should be admissible in evidence to prove the fact shown thereby, when it is proven by the proper parties with the necessary preliminary facts shown. This appears to us to be the holding in the *Startz Case*, 42 Tex. Civ. App. 85, 94 S. W. 207. The trial court, we think, should not have admitted the account sales. It is probable, however, when he instructed the jury that they could not consider it as showing the weight of the cattle, he met the objection made, and no such injury is shown as will require a reversal of the case, if there is evi-

dence in the record from which the jury could calculate the weight of the cattle without the account sales."

24. *Western Union Telegraph Co. v. McCormick* (Tex. 1920), 219 S. W. 270.

In a proceeding by assignee of claim for material against contracting company surety, secondary evidence to prove the contents of a telegram sent by plaintiff to his son, authorizing him to bind plaintiff upon reorganization of the bankrupt contracting company, in which settlement of this claim was alleged to have been included, was not error, since the delegation of authority at that time and under those circumstances could not tend to prove the existence of a similar agency at a previous time. *American Fidelity Company of Montpelier v. State* (Md. 1919), 109 Atl. 99.

25. *Dunham v. Western Union Telegraph Co.* (W. Va. 1920), 102 S. E. 113.

26. *Watson v. Western Union Telegraph Co.* (N. C. 1919), 101 S. E. 81.

27. *Cravens v. Hines* (Mo. 1920), 218 S. W. 912 (state shipment).

differs in grade and that its value materially depends upon its grade.<sup>28</sup>

**Questions for Jury.** In a shipper's action for injuries to several shipments of potatoes, the question as to the number of the cars, being one of identity, held for the jury under the evidence.<sup>29</sup>

**Instructions, Verdict, and New Trial.** In a suit by a shipper against a carrier to recover damages for failure to deliver a shipment of live stock promptly and in good order, the trial judge, in compliance with a request by the carrier, instructed the jury that a special contract of shipment, which relieves the carrier of all damage resulting from the carrier's negligence other than gross negligence, was binding on the shipper unless the shipper showed that the carrier was guilty of negligence. The carrier, having made such request to charge, is estopped from excepting to the charge upon the ground that the judge failed to charge that the carrier would not be liable under such special contract unless the carrier was guilty of gross negligence.<sup>30</sup> If the trial court failed to state any of plaintiff's contentions in its charge, the omission should have been called to its attention.<sup>31</sup> Where, without a special instruction on a point, the instruction given was sufficient, plaintiff, who asked no special instruction concerning it, cannot complain.<sup>32</sup> It was error on the part of the

28. *Brass v. Texarkana & Fort Smith Ry. Co.* (Tex. 1920), 218 S. W. 1040.

29. *Produce Trading Co. v. Norfolk Southern Ry. Co.* (N. C. 1919), 100 S. E. 316.

In an action for damage to or loss of a shipment of potatoes, whether defendant railroad or a steamboat company was the first carrier in the line of continuous transportation to final destination, held a question for the jury. *Produce Trading Co. v. Norfolk Southern Ry. Co.* (N. C. 1919), 100 S. E. 316.

30. *Seaboard Air Line Ry. Co. v.*

*Pruitt* (Ga. 1920), 102 S. E. 182.

31. *Futch v. Atlantic Coast Line Ry. Co.* (N. C. 1919), 100 S. E. 436.

32. *Futch v. Atlantic Coast Line Ry. Co.* (N. C. 1919), 100 S. E. 436.

If plaintiff's instruction was erroneous as submitting a question of law as to the proper interpretation of the contract in suit, but instructions asked by defendant were not substantially different, the fault in plaintiff's instruction was condoned by defendant. *Bradford v. McAdoo* (Mo. 1920), 219 S. W. 92.

In an action for damages to a shipment of live stock, an objection

trial judge to instruct the jury that the burden was upon the defendant carrier to prove the value of eggs partially destroyed.<sup>32</sup> In an action for damages to a shipment of live stock, that the railroad company was joined as party defendant with the Director General of Railroads, who was operating the road, does not

based on an alleged variance between an allegation that the shipment was delivered to defendant at L., and a bill of lading showing that it was delivered to connecting carrier at that point, should have been raised by motion to exclude the evidence, in view of Code 1919, Secs. 6104, 6250, as to amendments. *Southern Ry. Co. v. Finley & Seymour* (Va. 1920), 102 S. E. 559. In a recent case the court said:

"The amendment to the motion for new trial, filed on December 21, 1918, cannot be considered by this court for two reasons:

"(a) 'A ground of a motion for a new trial based upon the admission of evidence should state what objection was made thereto when it was offered at the trial, and should affirmatively show that the objection was then urged; otherwise no question was raised for determination.' *Hixon v. Myers*, 144 Ga. 408, 87 S. E. 475 (2); *Whiddon v. Salter*, 144 Ga. 77, 86 S. E. 243 (2).

"(b) 'Grounds of a motion for a new trial which are incomplete, and cannot be understood without resorting to an examination of the brief of evidence, fail to present any question for decision. *Head v. State*, 144 Ga. 383, 87 S. E. 273; *Sims v. Sims*, 131 Ga. 262, 62 S. E. 192.' *Smiley v. Smiley*, 144 Ga. 546, 87 S. E. 668; *Daniel v. Schwarzwiss*, 144 Ga. 81, 86 S. E. 239." *Atlantic Coast Line R. Co. v. Stovall-Pace Co.* (Ga. 1919), 100 S. E. 657.

Defendant urges that a new trial should be granted on the general grounds because no value of the lost box of goods was shown. An examination of the evidence reveals the fact that this contention is true, and for this reason the verdict is without evidence to support it, and the judgment must be reversed. *Atlantic Coast Line R. Co. v. Stovall-Pace Co.* (Ga. 1919), 100 S. E. 657.

In an action against a railroad company for damages from fire, an instruction that "even" if the jury found for plaintiff they should not return a verdict for more than the actual cost value of the property destroyed was not erroneous as an intimation of the court's opinion that a finding for plaintiff was not probable, as the quoted word was evidently used in its popular sense as carrying the same meaning as "although" or "if." *May v. Missouri Pac. R. Co.* (Ark. 1920), 219 S. W. 756.

In action against express companies for negligence, a finding by the jury that the S. company, which transported the butter, is not liable for the loss, is inconsistent with a finding that the A. company, which was organized subsequently to the loss and succeeded to the business of the S. company, is liable, and cannot support a judgment against the A. company. *King Grocery Co. v. Southern Express Co.* (N. C. 1919), 100 S. E. 325.

33. *Southern Express Co. v. Bass* (Ga. 1920), 102 S. E. 168.

require reversal of the whole judgment against both the Director General and the railroad, although the judgment as against the railroad was erroneous.<sup>34</sup> Where a case is submitted in special issues, a general charge to find for or against a party is not proper.<sup>35</sup>

**Appeal.** The Supreme Judicial Court, in the absence of evidence, cannot review the master's findings or refusal to find.<sup>36</sup> Where defendant, on appeal by the plaintiff from a judgment dismissing the case after sustaining of a motion to make the petition more definite and certain, embodied abandoned pleadings in its statement, such pleadings cannot be considered.<sup>37</sup> Where, neither in the petition for writ of error nor in the brief is the evidence pointed out which plaintiff in error charges was illegally admitted over objection, under the rule the assignment of error will not be considered.<sup>38</sup> Where plaintiffs sued defendant express company before a justice for failure to transport and deliver certain tools, and recovered judgment, and before the case was tried on appeal in the superior court the tools were found and delivered, the amount of the recovery in the superior court was not governed by the judgment rendered by the justice, which may have been based on the value of the tools, plus loss of time, while in the superior court the jury might deduct the value of the tools found.<sup>39</sup> There being, neither in the bill of exceptions nor in the court before argument begun, any assignment of error upon the exceptions pendente lite, the latter will not be considered. A bare recital in the bill of exceptions that exceptions

34. *Cravens v. Hines* (Mo. 1920), 218 S. W. 912 (state shipment).

In an action against a carrier and the Director General of Railroads for damages to a shipment of live stock, where it appeared that the Director General was operating the railroad, it was error to render a judgment against the railroad company. *Cravens v. Hines* (Mo. 1920), 218 S. W. 912 (state shipment).

35. *Western Union Telegraph Co. v. McCormick* (Tex. 1920), 219 S. W. 270.

36. *Director General of Railroads v. People's Express* (Mass. 1920), 126 N. E. 417.

37. *Browning v. Wells Fargo & C. Express* (Mo. 1920), 219 S. W. 665.

38. *Adams Express Co. v. Allen* (Va. 1919), 100 S. E. 473.

39. *Pendergraph v. American Ry. Express Co.* (N. C. 1919), 100 S. E. 525.

pendente lite were taken, without more, does not amount to an assignment of error upon the exceptions pendente lite.<sup>40</sup> The Court of Civil Appeals, as a rule, where there is evidence to support a verdict, will not disturb it.<sup>41</sup>

40. Seaboard Air Line Ry. Co. v. Pruitt (Ga. 1920), 102 S. E. 182.

41. Panhandle & S. F. Ry. Co. v. Arnett (Tex. 1920), 219 S. W. 232.

The first ground of the amendment to the motion for new trial, wherein

the admission of certain evidence is expected to, failing to show upon what ground objection was urged to such testimony, cannot be considered. Seaboard Air Line Ry. Co. v. Pruitt (Ga. 1920), 102 S. E. 182.

## CHAPTER XI.

### TELEGRAPH COMPANIES.

The act of Congress, June 18, 1910, fixed the status of interstate telegraph companies as that of common carriers, and they are not only subject to the requirements of the Interstate Commerce Acts, but are entitled to have their liabilities determined by the law as administered by the United States courts.<sup>1</sup> The act of Congress of June 18, 1910, declaring telegraph companies to be common carriers and subject to the federal statutes regulating interstate commerce, and authorizing them to make a reasonable and just classification of messages transmitted by them, into day, night, repeated, unrepeated, letter, commercial, press, government, and to charge different rates for the different classes of messages, warrants such company in inserting as a condition of its contract with the sender of a message, that, in no event shall it be liable for damages "for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof." Such a condition is a reasonable regulation within the purview of the federal statute.<sup>2</sup> Where the President of

1. *Western Union Telegraph Co. v. McDavid* (Tex. 1920), 219 S. W. 853.

2. *Dunham v. Western Union Telegraph Co.* (W. Va. 1920), 102 S. E. 113.

Under the provisions on the back of a telegram to the effect that the company should not be liable beyond

the cost of transmission for mistakes or delays in transmission, unless the message was repeated, and that the company should not be liable for damages for mistakes in transmission, whether caused by negligence of its servants or otherwise, beyond the sum of \$50, the company was liable to the extent of \$50, where a mistake

the United States acting under the joint resolution of July 16, 1918, has taken control of a telegraph company's lines through the Postmaster General, and is operating them as a government agency, no suit can be instituted against the company for delay in delivering messages.<sup>3</sup> A telegram offered for transmission

in an unrepeatable message was caused by the negligence of the company. *Western Union Telegraph Co. v. McDavid* (Tex. 1920), 219 S. W. 853.

An interstate telegraph company may limit its liability in damages for negligence of its servants in transmitting unrepeatable interstate messages involving different rates. *Western Union Telegraph Co. v. McDavid* (Tex. 1920), 219 S. W. 853.

In an action of tort brought by the addressee of a telegram for damages for failure to deliver it, the telegraph company may prove as defenses, under the general issue, any reasonable and lawful conditions of the contract between the company and the sender. *Dunham v. Western Union Telegraph Co.* (W. Va. 1920), 102 S. E. 113.

Where an interstate telegram is sent at a reduced rate in consideration of an agreement by the sender not to hold the telegraph company liable in excess of \$50 for negligent delay, the sendee cannot recover more than \$50 for damages caused by negligent delay in delivery. *Western Union Telegraph Co. v. Price* (Tex. 1920), 219 S. W. 869.

3. *Foster v. Western Union Telegraph Co.* (Mo. 1920), 219 S. W. 107.

Where the negligent act complained of was committed while defendant's telegraph lines were under control and operation of the United States government, pursuant to joint resolution July 16, 1918, and proclamation

of the President, defendant was not liable, under Kirby's Dig. § 7947, as to recovery of damages for mental anguish "for negligence in receiving, transmitting or delivering messages," and suit cannot be maintained against it. *Western Union Telegraph Co. v. Davis* (Ark. 1920), 218 S. W. 833.

In an action for a penalty under Rev. St. 1909, § 3330, for failure to promptly transmit and deliver telegraph messages, where it appeared that the message was sent from a point within the state to another point within the state, but routed through a point in another state from which it was relayed to its destination, the message was an interstate one governed by the Laws of Congress, and the state special penalty statutes were not applicable. *Foster v. Western Union Telegraph Co.* (Mo. 1920), 219 S. W. 107.

Under the federal rule no recovery of punitive damages can be had on account of the willful conduct of the servant of a telegraph company in refusing to accept an interstate message for transmission, unless the commission of the wrong was authorized by the company, his master, participated in by it, or ratified. *Postal Telegraph-Cable Co. v. Eubanks* (Miss. 1920), 83 So. 678.

During the period of possession, control, and supervision of the telegraph and telephone by the Postmaster General, the State Public Service Commission had no jurisdiction to make orders approving or making ef-

from a point in Mississippi to a point in Tennessee was an interstate message, governed as to the recovery of punitive damages by federal law.<sup>4</sup> Where the configuration of the state boundary or the location of a railroad or telegraph line necessitates the transportation of freight and passengers or the transmission of messages between two points in the state by the most usual and direct route through another state, the transaction is interstate, and controlled by federal law.<sup>5</sup> Where a claimant by letter and telegram accepted a written offer to purchase a business and property, he was not damaged by delay in delivery of the telegram, though his co-owner did not sign the letter of acceptance, since if, because of this fact, the letter did not create a contract, the telegram would not have done so; and, if the

effective any tariff rate to be charged for services rendered by telegraph or telephone systems. *State v. Public Service Commission* (Wash. 1920), 188 Pac. 7.

4. *Postal Telegraph-Cable Co. v. Eubanks* (Miss. 1920), 83 So. 678.

5. *Watson v. Western Union Telegraph Co.* (N. C. 1919), 101 S. E. 81.

Where a telegraph company, merely to evade liability under the laws of North Carolina, constantly transmitted messages between two points in the state by routing them through a point in South Carolina, the subterfuge did not render a death message an interstate one to prevent recovery under state law for mental anguish and delay in delivery. *Watson v. Western Union Telegraph Co.* (N. C. 1919), 101 S. E. 81.

Where the initial and terminal points of a telegraph message are within the state, and there was a direct telegraph line of the defendant company between such points over which the message could have been transmitted without passing through

another state, the message is intrastate, even though relayed through another state, and the defendant is liable under state law for negligent alteration in transmission, whether the alteration occurred within or without the state, in view of Const. U. S. art. 1, §8, cl. 2, relating to interstate commerce, and amendment 10, reserving power to the states. *Speight v. Western Union Telegraph Co.* (N. C. 1919), 100 S. E. 351.

Where plaintiff went to defendant telegraph company's agent and stated he wanted the agent to deliver a message to a point in another state, which the agent refused to do, the act of the agent was not wholly disconnected with interstate commerce, but was so intimately related to the proposed message, interstate in character, that his refusal to receive it was the act of an interstate agent in violation of a federal duty with reference to an interstate matter, and therefore controlled by the federal law as to the telegraph company's liability for punitive damages. *Postal-Telegraph-Cable Co. v. Eubanks* (Miss. 1920), 83 So. 678.

letter created a contract as to the offerer and plaintiff which he could not fulfill for want of his co-owner's consent, the loss of the sale was not the fault of the telegraph company.<sup>6</sup> Where a written offer to purchase property and business was accepted by claimant by letter and telegram, and, though both were delayed in reaching the offerer, the offer was not withdrawn until after their receipt, there was a consummated contract binding the offerer when the letter was mailed, and plaintiff was not damaged by delay in delivery of the telegram, though because of the delay in hearing from plaintiff the offerer did not carry out the offer as he would otherwise have done.<sup>7</sup> Where the owner of hogs sent a message to a prospective buyer stating: "Can see hogs today. Over thirteen thousand pounds. Come today"—informing telegraph company's agent to rush the message through, as he expected a prospective buyer to come on the train the same morning to get the hogs, as he had them ready and waiting for buyer, the company did not have notice that special damage would result from nondelivery of message, and the failure to promptly deliver it, preventing the buyer from buying

In an action against a telegraph company for negligent alteration of a message in transmission between points within the state, in view of Laws 1919, c 175, making such messages, *prima facie* intrastate, and prohibiting their conversion into interstate messages, the burden was upon the defendant claiming the message was interstate to show that the transmission through another state was not done to evade the jurisdiction of the state, whose laws give damages for such negligence. *Speight v. Western Union Telegraph Co.* (N. C. 1919), 100 S. E. 351.

On an appeal in an action for damages for negligent alteration in transmission of a telegram, it is unnecessary to determine whether the message was sent out of the state to evade the state law where the message was intrastate as a matter of

law. *Speight v. Western Union Telegraph Co.* (N. C. 1919), 100 S. E. 351.

The fact that defendant telegraph company routed all messages between two points in North Carolina through a point in South Carolina, or Richmond, Va., held sufficient evidence for the jury on the question of the good faith of the company in so transmitting messages, material on the point whether they were *bona fide* interstate, and the telegraph company's liability therefore not controlled by state law. *Watson v. Western Union Telegraph Co.* (N. C. 1919), 101 S. E. 81.

6. *Grover v. Western Union Telegraph Co.* (Calif. 1920), 187 Pac. 973.

7. *Grover v. Western Union Telegraph Co.* (Calif. 1920), 187 Pac. 973.

the hogs, did not entitle the buyer to recover the profits he would have made if he had purchased the hogs at the prevailing market price.<sup>8</sup> Messages by a purchaser to a seller, reading: "I am sick, can't come now. Will let you know later"—and "Will be there," in connection with statements that he had a contract whereby the addressee was to deliver cattle, and that he wanted to send a message to have the addressee hold them, held not notice that the purchaser would suffer special damages for loss of profits on the purchase and shipment of the cattle, delivery of which was refused by reason of nondelivery of messages.<sup>9</sup> Where by reason of a telegraph company's neglect to deliver a purchaser's message relative to holding cattle for delivery the seller declined to deliver them, the measure of damage, in the absence of notice of special damages, is the difference between the market value and contract price at the place of delivery, and in case there is no difference there can be no recovery.<sup>10</sup> Where, in response to a service message inquiring as to the delivery of a message, the receiving office was informed that the message had not been delivered, the agent of the office where delivery was to be made, while entitled to testify that he did not send the reply, cannot give a conversation he had with the operator whom he claimed sent the reply.<sup>11</sup> In an action for failure to seasonably deliver a message, the question whether delivery was made as claimed by the telegraph company or not held, under the evidence, for the jury.<sup>12</sup> No recovery for mental anguish can be had by reason of failure to attend the burial of a relative, in the absence of proof of physical injury, as a result of failure to promptly deliver an interstate telegram.<sup>13</sup> The testimony of the claimant that as soon as he received a telegram announcing the serious illness of his

8. Western Union Telegraph Co. v. Sanders (Tex. 1920), 219 S. W. 536.

9. Western Union Telegraph Co. v. George P. Brittain & Sons (Tex. 1920), 219 S. W. 296.

10. Western Union Telegraph Co. v. George P. Brittain & Sons (Tex. 1920), 219 S. W. 296.

11. Western Union Telegraph Co. v. McCormick (Tex. 1920), 219 S. W. 270.

12. Western Union Telegraph Co. v. McCormick (Tex. 1920) 219 S. W. 270.

13. Western Union Telegraph Co. v. Price (Tex. 1920) 219 S. W. 869.

brother, he started to reach his brother, was sufficient to go to the jury on question whether the claimant would have gone to see his brother had the message been received in time.<sup>14</sup>

14. *Butler v. Western Union Telegraph Co.* (N. C. 1919), 101 S. E. 87.

The presumption is that when a person receives a telegram announcing the sickness or impending death of a very near relative, within a distance of about 35 miles, he will make every reasonable effort to go to his relative. *Butler v. Western Union Telegraph Co.* (N. C. 1919), 101 S. E. 87.

In an action for damages from delay in delivering a telegram sent to the addressee in care of a company, testimony of messenger boys that it was the habit of one of them to deliver such messages to the company's manager, and that the other boy believed he delivered the message to such manager, who was not called as a witness for plaintiff, though present, constituted *prima facie* proof that the message was offered to the manager. *Western Union Telegraph Co. v. Price* (Tex. 1920), 219 S. W. 869.

In action for negligent failure of defendant telegraph company to deliver telegram in time for plaintiff to reach the sick bed of his brother and be present at the funeral, held, under the evidence, that motion for nonsuit was properly overruled. *Butler v. Western Union Telegraph Co.* (N. C. 1919), 101 S. E. 87.

All just and reasonable conditions and regulations, prescribed in a contract between a telegraph company and the sender of a message, are binding on the addressee, whether his action to recover damages for breach of duty be in tort or in assumpsit on

the contract. *Dunham v. Western Union Telegraph Co.* (W. Va. 1920), 102 S. E. 113.

A condition in a telegraph contract, relieving a telegraph company from liability for damages, unless the claim therefor is presented in writing within 60 days, is also a reasonable and valid regulation. *Dunham v. Western Union Telegraph Co.* (W. Va. 1920), 102 S. E. 113.

A condition in a contract for the transmission of a telegram, prescribing free delivery limits to the radius of one mile in cities of 5,000 population or more, and to one-half mile in smaller towns, is a reasonable regulation. *Dunham v. Western Union Telegraph Co.* (W. Va. 1920) 102 S. E. 113.

Where a telegraph company received a message announcing the fatal illness of the addressee's mother under a special contract for delivery to the addressee personally, delivery to the company in whose care the message was sent was insufficient; it appearing that the addition was merely for the convenience of the telegraph company. *Western Union Telegraph Co. v. McCormick* (Tex. 1920), 219 S. W. 270.

The failure of a brother, knowing sister to be critically ill, to go to her without receiving telegram that she could not live did not preclude him from recovering for negligent delay in delivery of telegram preventing his presence at the funeral; the telegraph company's negligence, and not his negligence, being the proximate cause of his failure to be present.

*Western Union Telegraph Co. v. Morgan* (Tex. 1920), 219 S. W. 244.

A brother suing a telegraph company for negligent delay in delivery of a telegram as to sister's impending death, preventing him from being present at her funeral, was not, as a matter of law, contributorily negligent in not leaving for his sister's bedside without telegram, though he knew that she was critically ill. *Western Union Telegraph Co. v. Morgan* (Tex. 1920), 219 S. W. 244.

A mother's recovery of damages for delay in delivery of her telegram to son, informing him of daughter's impending death, did not preclude son from recovering damages for inability to be present at his sister's funeral; the telegraph company's liability to mother and son being several and not joint. *Western Union Telegraph Co. v. Morgan* (Tex. 1920), 219 S. W. 244.

In an action by the addressee for failure to seasonably deliver a message announcing the fatal illness of

his mother, allegations that in the usual and customary routes of travel the addressee, had the message been promptly delivered, could have reached his mother in time to have found her rational, are sufficient. *Western Union Telegraph Co. v. McCormick* (Tex. 1920), 219 S. W. 270.

In action by the addressee for failure to seasonably deliver a message, replies to service messages sent by the receiving office to the point of delivery inquiring as to delivery were admissible in evidence. *Western Union Telegraph Co. v. McCormick* (Tex. 1920), 219 S. W. 270.

In an action by the addressee for delay of delivery of a message announcing his mother's last illness, where he testified to his grief, the question of damages from his grief was for the jury, though he also testified to his anger and disappointment. *Western Union Telegraph Co. v. McCormick* (Tex. 1920), 219 S. W. 270.

# The Loss and Damage Review

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VOLUME 3.

No. 4

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MAY 1, 1920

By

**HERBERT C. LUST**

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**By**

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**THE  
LOSS AND DAMAGE  
REVIEW**



## CHAPTER I.

### CONTROL AND REGULATION OF CARRIERS.

**Federal Legislation.** The interpretation of federal laws by federal courts controls the decisions of state courts on such questions even in their own jurisdiction.<sup>1</sup>

#### **State Regulation.<sup>2</sup>**

1. *Winget v. Grand Trunk Western Ry. Co.* (Mich. 1920) 177 N. W. 273.

A contract liability, express or implied, judicially enforceable by the Court of Claims against the United States, can be created only by some officer of the government lawfully invested with the power to make such contracts, or to perform acts from which they may be lawfully implied.

*Eastern Extension, Australasia & China Telegraph Co. v. United States* 40 Sup. Ct. 168.

2. It is competent for the Legislature to authorize municipal authorities to require that a license shall be obtained for all vehicles engaged in carting for hire, whether under special contracts, or where the employment is publicly solicited.

*Stevenson & Co. v. Hartman* 181 N. Y. S. 465.

*Burn's Ann. St. 1914, § 3920b to 3920h*, giving statutory action for damages on freight loss claim as admitted where neither paid nor rejected

within 90 days, is not in violation of Const. U. S. Amend. 14, or Const. Ind. § 68, relating to due process and to privileges and immunities of citizens of the United States.

*Jackson v. Mauck* (Ind. 1920) 126 N. E. 851.

In shipper's action against carrier for loss of hogs under *Burn's Ann. St. 1914, § 3919, 3920*, on the claim as admitted it not having been paid or rejected within 90 days, where the answer alleged a contract that no action for loss should be maintained unless begun within 90 days after action accrued, an instruction that if the claim was filed April 29, and defendant required until August 4 to complete its investigation of alleged loss, this might be considered with other evidence in determining whether the contract condition requiring action within 90 days for said loss was reasonable or unreasonable, properly left to the jury the issue whether the action was begun in time.

*Jackson v. Mauck* (Ind. 1920) 126 N. E. 851.

**Who are Common Carriers.** Whether a carrier of goods is a common or public carrier depends on whether he becomes such under a statute or ordinance, or holds himself out, either expressly or by course of conduct, as ready to carry for hire the goods of all persons indifferently.<sup>3</sup>

3. *Stevenson & Co. v. Hartman*, 181 N. Y. S. 465.

One operating a truck for hire under a license issued by the city of New York was not a common carrier, although he kept his vehicle at a stand in a public street, where he made his own choice of customers,

and had no uniform rate of charges, in view of *Cosby's Code of Ordinances of New York City 1919*, p. 364, *Greater New York Charter*, § 51, and *Code of Ordinances*, art. 11, § 144.

*Stevenson & Co. v. Hartman*, 181 N. Y. S. 465.

## CHAPTER II.

### BEGINNING OF LIABILITY.

**Nature and Functions of the Bill of Lading.**<sup>½</sup> In construing a bill of lading under which an interstate shipment was made, decisions of the federal courts construing bills of lading must control.<sup>1</sup> And if there be any doubt arising from the language used as to its meaning, it is to be construed most strongly against the carrier who prepared it.<sup>2</sup>

**False Bill of Lading.** The power of Congress under the Constitution, to regulate foreign and interstate commerce and to make all laws necessary and proper for carrying into execution such power, includes the power to penalize counterfeiting and use of a fictitious bill of lading, even though there is no actual or contemplated commerce; commerce being interfered with by such an instrument.<sup>3</sup>

**Failure to Furnish Facilities.** If a great demand upon a railroad to furnish cars is sudden, and one the railroad has no reason to apprehend, and which it could not reasonably have expected, an individual shipper can not insist as an absolute right upon having his requisitions filled.<sup>4</sup> And in case of a car shortage, it is the duty of a railroad to allot cars so as to

½. Where claimant paid defendant express company \$194.50 for the remittance of 1,000 rubles, to plaintiff's wife in Ruusia and received a receipt for the money and containing the terms on which it was received and what was to be done by the company, the receipt was contractual in form, and exclusive of other evidence as to the terms of the contract that it contained.

Ketcher v. Am. Express Co. (N. J. 1920) 109 A. H. 741.

1. Mark Owen & Co. v. M. C. R. R. (Ill. 1920), 125 N. E. 767.

2. Mark Owen & Co. v. M. C. R. R. Co. (Ill. 1920), 125 N. E. 767.

3. U. S. v. Ferger, 39 Supreme Court 445.

4. Anderson v. C. M. & St. P. Ry. (Mich. 1919), 175 N. W. 246.

prevent unjust discrimination.<sup>5</sup> To measure a railroad's duty to prepare to supply cars to a shipper, the normal demand of the trade is not to be estimated by the number of cars needed when such demand is least, but the reasonable maximum requirements should be anticipated.<sup>6</sup> Claimant called a station agent and asked him to furnish three cars on Monday to ship cattle out. The agent said he would have them ready. This constituted a contract under the Interstate Commerce Act.<sup>7</sup> Claimant brought suit for failure of a carrier to furnish a sufficient number of cars to move its shipment of logs, and the carrier defended on the ground that it was not bound to know that the shipper would require an unusual number of cars. In holding that it was the duty of a carrier to furnish a sufficient supply of cars to meet the normal demands of its trade, the court said.<sup>8</sup> "The trial judge instructed the jury: 'The defendant was only bound to have on hand a sufficient supply of cars to meet the normal demands of the trade. It was not obliged to have a sufficient supply on hand to meet abnormal and unexpected conditions. But the normal demand of the trade is not to be estimated by the number of cars needed when the normal demand is least, but by the number when the normal demand is heaviest, in respect to a commodity, such as logs, where there are certain well-known seasons during which the normal demand for log transportation is practically the same and heavier than at other times. And while the number of cars needed in each of the months of these seasons may be taken into consideration in determining the number needed to supply the demand during all of the logging season, the number needed during the other months of the year outside of the logging season—the summer months in this case—is entitled to little consideration in determining what number of cars is needed to supply the normal demand of the trade.' The other assignment of error relates to that portion of the above-quoted instruction after the first two sentences. This instruction followed the rule

5. *Anderson v. C. M. & St. P. Ry.* (Mich. 1919), 175 N. W. 246.

7. *Thee v. Wabash Ry.* (Mo. 1920), 217 S. W. 566.

6. *Anderson v. C. M. & St. P. Ry.* (Mich. 1919), 175 N. W. 246.

8. *Anderson v. C. M. & St. P. Ry.* (Mich. 1919), 175 N. W. 246.

laid down by the court of last resort of Kentucky in the case of *Illinois Central R. R. Co. v. River & Rail Coal & Coke Co.*, 150 Ky. 489, 150 S. W. 641, 44 L. R. A. (N. S.) 643, Ann. Cas. 1914C, 1255, and substantially contains the language of that court in deciding that question. We think it states the correct rule. In *Shoptaugh v. Railroad*, 147 Mo. App. 17, 126 S. W. 754, it was said: 'Taking up the appeal on the merits, we hold it would have been a good defense if an extraordinary increase of business on defendant's line, which could not have been anticipated and provided for by using judgment and diligence, had prevented defendant from furnishing the cars. Railroad companies are expected to be prepared with an equipment necessary to handle the average traffic over their lines and such an increase as would be expected by managers of experience, for the volume of traffic will vary with the seasons and general business conditions. These contingencies ought to be provided for, and the law requires them to be; but a railroad carrier need not be ready to handle any accession of business, however great, which some unforeseeable condition may cause; and in case an extraordinary traffic occurs and consequent congestion of freight, the carrier must distribute its cars at the various stations in proportion to their needs.' In the case of *State v. C., B. & Q. R. Co.*, 71 Neb. 593, 99 N. W. 309, it was said: 'It is the duty of a railroad company to provide itself with all the instrumentalities and facilities necessary to carry on the business for which it is organized. It must furnish the necessary cars to transport the goods which are offered to it for carriage, but to this rule there is an exception. When the carrier has furnished itself with the appliances necessary to transport an amount of freight which may in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time.' The trial judge very carefully guarded his instruction and confined the rule to the normal demand of seasonal shipments. The defendant was bound to know that while the snow was on logs would be gotten out and offered for shipment. That

more would be offered for shipment during that season of the year than at other seasons was well known to the officers and agents of defendant, as this record discloses. The carrier is bound to know that at certain seasons of the year there will be movements of certain seasonal commodities, and was bound to anticipate and provide for such demand. There are certain portions of the state where fruit is raised in abundance and offered for shipment to the market. Clearly the carrier would not discharge either its common-law or its statutory duty by providing itself with only equipment sufficient to transport such fruit if given the entire year so to do. It must have sufficient equipment to transport such fruit when the normal demand is the greatest; and this is true and must be true of all seasonal freight. Any other rule would refuse to the shipper of seasonal commodities the markets of the country when such markets are open and available. We do not mean to say that the carrier is bound to provide for abnormal conditions, for unforeseen and unprecedented demands. In the instant case the jury was told: 'The defendant was only bound to have on hand a sufficient supply of cars to meet the normal demands of the trade. It was not obliged to have a sufficient supply on hand to meet abnormal and unexpected conditions.' Further instructions were not requested, and we discover no other error in the charge except the one noted." In this case it was contended by the carrier that a state court did not have jurisdiction of such an action on interstate shipments. In holding that the state courts had jurisdiction the court said:<sup>9</sup> "By the act of February 4, 1887, entitled 'An act to regulate commerce' (24 U. S. Statutes at Large, p. 379), the Interstate Commerce Commission was created. By this act and amendments to it (see 25 U. S. Statutes at Large, p. 855; 26 U. S. Statutes at Large, p. 743; 32 U. S. Statutes at Large, p. 847; 34 U. S. Statutes at Large, p. 854; U. S. Comp. St. § 8563 et seq.), comprehensive provisions have been enacted in the regulation of interstate commerce and broad powers have been conferred upon the commission, powers of an administrative and quasi judicial character. In the original act,

9. *Anderson v. C. M. & St. P. Ry.* (Mich. 1919), 175 N. W. 246.

and it has continued without amendment, by section 22 it is, among other things, provided: 'And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' In the leading cases of *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, the court had before it for review the decision of the court of last resort of Texas. The Abilene Company had brought suit in the state court against the railway company, alleging that the railway company had exacted an unjust and unreasonable rate for certain interstate shipments. There was also an allegation that the rate exacted was discriminatory. The railway company defended principally on the ground that the state court was without jurisdiction; that the Interstate Commerce Commission must be first applied to, as the questions involved had been committed to that body by the act to regulate commerce. A judgment for the oil company in the trial court had been affirmed by the Court of Civil Appeals. In an exhaustive opinion by the present Chief Justice, then Mr. Justice White, the legislation and authorities were reviewed, and the functions of the commission and of the courts and the jurisdiction of both were fully considered, and it was held that the courts were without jurisdiction where the character of the question was as there involved, until after the commission had acted, that the questions were administrative, the rate-making power was not in the judiciary, and that Congress, acting within its power, had committed the determination of such administrative questions to an administrative body to the exclusion of the courts, and the judgment was reversed. This case was followed and the reasoning of the opinion applied and extended in the later decisions of that court. Among others, see *Robinson v. B. & O. R. R.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517; *Northern Pac. Ry. Co. v. Solum*, 247 U. S. 477, 38 Sup. Ct. 550, 62 L. Ed. 1221; *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915D, 315; *Mitchell Coal & Coke Co. v. Pennsylvania*

R. R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472; *Morrisdale Coal Co. v. Pennsylvania*, 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494. We have stated that the doctrine of the *Abilene Case* had been extended. In the case of *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, *supra*, Mr. Justice Pitney in an exhaustive dissenting opinion insisted that it had been extended too far; that it had nullified certain of the provisions of the act itself. But the cases cited and others which might be added must be taken as laying down the rule that, where the questions are administrative in character, they must be first submitted to the Interstate Commerce Commission, and that, unless first submitted to such commission, the courts are without jurisdiction to afford relief. This naturally leads us to consider whether the questions here involved are administrative in character such as to preclude the state court from inquiring into and adjudicating them without application having been first made to the commission. And first as to the failure to furnish sufficient cars. By the Hepburn Act (34 U. S. Statutes at Large, 584), an amendatory act to the act of 1887, it is provided: 'And it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.' U. S. Comp. St. § 8563. This was but declaratory of the common law. In the case of *Pennsylvania R. R. Co. v. Sonman Coal Co.*, 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188, the court had before it for review a decision of the Supreme Court of the state of Pennsylvania. The coal company had brought suit in the state court to recover against the railroad company for damages claimed to have been occasioned by the failure of the railroad company to furnish cars and for unjust discrimination. Upon the trial the claim of unjust discrimination was abandoned, leaving only the question of failure to furnish cars as the basis of recovery. A judgment for \$145,830.25 had been affirmed by the Supreme Court of the state. 241 Pa. 487, 88 Atl. 746. The contention there made was the same as here made, that the state court was without jurisdiction; that the questions were administrative in character, and must first be submitted to the Interstate Commerce Commission. Mr. Justice Van Devanter, speaking for the court, after

citing authorities, said: 'Applying these rulings to the case in hand, we are of opinion that a state court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in section 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view. With the charge of unjust discrimination eliminated, the ground upon which a recovery was sought was that, for a period of four years, during which the conditions were normal, the carrier had failed upon reasonable demand to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine. Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. That duty arose from the common law up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded as merely adopting the common-law rule. There was evidence tending to show, and the jury found, that the conditions in the coal trade were normal and the demand for the cars reasonable. Indeed, without objection from the carrier, the court said, when charging the jury: "There is no testimony disputing the claim of the plaintiff that these were normal times." The carrier insisted and the jury found that the carrier had a generally ample car supply for the needs of the coal traffic under normal conditions, and the jury further found that the failure to furnish the cars demanded was without justifiable excuse. Thus far it is apparent that no administrative question was involved—nothing which the act intends shall be passed upon by the commission either to the exclusion of the courts or as a necessary condition to judicial action. But there was testimony tending to show that the carrier was applying or following a rule for allotting cars which did not entitle the coal company to receive as many cars as it needed and requested, and because of this it is contended that the reasonableness of this rule was in issue and was an administrative question which the act intends that the commission shall solve. We cannot accede to the contention. The conditions in the coal trade being normal, as just shown, the number of cars to which the coal company was entitled was to be meas-

ured by its reasonable requests based upon its actual needs. It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 133 (35 Sup. Ct. 484, 59 L. Ed. 867). Such a rule being inapplicable in the conditions existing at the time, the rule mentioned in the testimony could not be a factor in the decision of the case, and whether in a time of unforeseen car shortage it would be reasonable or otherwise was not then material.'"

**Transportation Over Designated Route.** Where the consignee of seed potatoes which directed shipment over a particular route, a direction disregarded by the seller, was compelled to accept the consignment when it arrived late under penalty of having its license revoked by the National Food Administrator, the consignee having been forced to accept, there was no acceptance by it under the contract.<sup>10</sup>

10. *Hudgins Produce Co. v. Missouri Pac. R. Co.* (Ark. 1919), 215 S. W. 606.

## CHAPTER III.

### NEGLIGENCE DURING TRANSPORTATION.

#### In General.<sup>1</sup>

**Confiscation of Fuel.** The motive which controlled a railroad in its conversion of a shipper's coal is no defense, though such motive may be shown, where exemplary damages are claimed in the shipper's action for damages.<sup>2</sup>

1. An express company receiving \$194.50, stated in its foreign money order receipt to be the equivalent of 1,000 rubles, for remittance to the customer's wife at a place in Russia, undertook to convert the customer's money, after deducting its own charges, by cable into 1,000 rubles in Russia, which was to be forwarded or remitted, to "remit" meaning to transmit or send, especially to a distance as money, and "forward" meaning to send forward, to transmit. *Ketcher v. Am. Express Co.* (N. J. 1920), 109 Atl. 741.

While the right to stop delivery of goods sold on credit is predicated on the insolvency of the buyer, neither insolvency nor bankruptcy of the buyer works a rescission of the contract of sale, and an effective stoppage in transitu does not in itself annul the sale or divest the purchaser of the title to the goods, which has passed on delivery to the carrier. *In re Arctic Stores*, 258 ed. 688.

2. This suit was originally instituted by the coal company to recover of the railroad company the

value of two cars of coal, which it was alleged the railroad company had unlawfully converted to its own use.

The Both Coal Company are coal dealers in Knoxville. The coal company purchased said coal at Bernstadt, Ky., where said coal was delivered to the railroad company, in September, 1917, to be transported to the coal company at Knoxville, Tenn. The railroad company converted said coal at Corbin, Ky., which town is in the vicinity of Bernstadt, Ky. This was during the coal strike, and the railroad converted said coal for use in firing its locomotives; confiscation being necessary in order to keep its trains in operation.

It is insisted by the coal company that the proper measure of damages is the market value of the coal at the point of destination, which is Knoxville, while the railroad insists that it is the market value at the place of conversion, which is Corbin, Ky.

Ordinarily the market value at the time and place of conversion is the rule; there is an exception, however,

where the property is converted by a common carrier to whom it has been intrusted for transportation, in which case the rule, supported by the great weight of authority, is that the market value at the point of destination, less the cost of transportation, governs. *Dean v. Vaccaro*, 2 Head, 488, 75 Am. Dec. 744; *Erie Dispatch v. Johnson & McGuire*, 87 Tenn. 490, 11 S. W. 441; *Hutchinson on Carriers* (3d Ed.) vol. 3, § 1374; *Moore on Carriers*, 398; *Cyc.* 2094; *Sedgwick on Damages*, (9th Ed.) § 844; *Farwell v. Price*, 30 Mo. 587; *Blackmer et al. v. Cleveland C. C. & St. L. R. R. Co.*, 101 Mo. App. 557, 73 S. W. 913; *Spring v. Haskell*, 4 Allen (Mass.) 112; *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502; *McGregor & Co. v. Kilgore*, 6 Ohio 358, 27 Am. Dec. 261; *Shaw v. S. C. R. Co.*, 5 Rich. 462 (S. C.) 57 Am. Dec. 768; *Rathbone v. Neal*, 4 La. Ann. 563, 50 Am. Dec. 579; *Wallingford v. Kaiser*, 191 N. Y. 392, 84 N. E. 295, 15 L. R. A. (N. S.) 1126, 123 Am. St. Rep. 600; *Downing et al. v. Outerbridge*, 79 Fed. 931, 25 C. C. A. 244; *McCaull-Dinsmore Co. v. Chicago M. St. P. R. R. Co.* (D. C.) 252 Fed. 664.

We think, therefore, that the Court of Civil Appeals was correct in following the rule just announced.

There was no evidence as to the wholesale market value of the coal in cars on track at Knoxville. It was shown by the evidence that the retail price of coal in Knoxville was from \$6 to \$6.25 per ton, and that it cost the coal company \$1.50 per ton to market said coal after its arrival in Knoxville. The cost of the coal per ton at Bernstadt, Ky., was \$2.90 per ton, and the freight on same to Knox-

ville was 80 cents per ton, making the cost of the coal delivered in Knoxville \$3.70 per ton, to which was to be added \$1.50 per ton for marketing same, making a total of \$5.20 per ton. The court averaged the evidence as to the retail price of coal in Knoxville, and found as a fact that same was \$6.12½ per ton, leaving a net profit to the coal company of 92½ cents per ton.

The Court of Civil Appeals allowed the coal company a recovery of \$6.12½ per ton, less 80 cents per ton for freight, and less the further sum of \$1.50 per ton for the cost of marketing the coal in Knoxville; also interest thereon from September 25, 1917, which was the date of the conversion.

The railroad company assigned this action of the Court of Civil Appeals as error, and says that the coal company was not entitled to recover the retail price at Knoxville, less freight and cost of selling it, and insists that, if the measure of damages was the price of the coal at destination, it should have been the wholesale price in carload lots.

There is nothing in the record to show that there was any wholesale market for coal in carloads in Knoxville at the time. The circuit judge found as a fact that \$1.50 per ton would put it on the market after its arrival, so that, in the absence of proof to the contrary, we think the Court of Civil Appeals was warranted in fixing the damages in the manner indicated, for, if the retail price was \$6.12½ per ton, and the total cost of marketing it after its arrival in Knoxville was \$1.50 per ton, then the court was justified in concluding that the wholesale price

**Delay.** The law imposes upon a common carrier of freight, in cases of extraordinary delay in transportation, the duty to use all reasonable care to protect the shipment from damage on account of such delay, and it is also the duty of the carrier to give the consignor or owner notice of the delay.<sup>3</sup> Where the bill of lading covering a shipment of horses by express contained no limit of time for the completion of the transportation, the express company was required to perform within a reasonable

per ton was \$6.12½ less \$1.50, or \$4.62½.

"Direct testimony as to value is not indispensable, if there is proof of the character, quality, and quantity of the injury from which the jury may properly estimate the loss or damage." *Moore on Carriers*, 402.

In the case under consideration the Court of Civil Appeals followed the rule announced in *Holden v. New York C. C. Ry. Co.*, 54 N. Y. 662, which is as follows:

"If the property in the course of transportation is converted at an intermediate point, the measure of damages is its value at the place of destination, less the costs of carrying and effecting a sale in that market."

This method exactly measures the damages sustained by the defendant in error in this case. In a case where the overhead expense of operating a retail business is not susceptible of computation, this rule might not be practical.

► Counsel for the railroad company cite authorities to the effect that the retail price cannot be recovered. By examining those cases it will be seen that such a holding is based on the fact that the expense of putting the goods on the market is not taken into consideration. In the instant case,

however, the circuit judge has found as a fact that the exact expense that the defendant in error would have incurred in marketing its coal, which differentiates this case from the cases relied upon by the railroad company.

This holding certainly meets the equities of this case. As stated by counsel in their brief:

"To allow a carrier to convert the goods of its shipper because its business had become so prosperous that it could not supply its engines with coal in the ordinary way, and allow the carrier to deprive the shipper of the legitimate profits of his business, and pay for the goods converted only the cost at the place of shipment, does not appeal to either the reason or the conscience of the court."

If the railroad confiscates the property of the shipper, it should be willing to pay him the profit he would have earned, had the railroad complied with its contract.

The motive which controlled the railroad in the conversion of the coal, is no defense, although it may be shown in a case where exemplary damages are claimed. *Roth Coal Co. v. Louisville & N. R. Co.* (Tenn. 1919), 215 S. W. 404.

3. *P. C. C. & St. L. Ry. v. Home Ins. Co.* (Ind. 1919), 125 N. E. 426.

time.<sup>4</sup> An express company as a common carrier having accepted horses for transportation, the fact of governmental control of it and other carriers on account of war is not a defense to the consignee's suit for loss and depreciation of the shipment, caused by severe weather and delay in delivery.<sup>5</sup> But it is the duty of a carrier to exercise reasonable care to protect property from loss or injury during delay in transportation, where the circumstances and conditions are such as cause an unusual delay, and it is the duty of the carrier to give the consignor or owner notice of the delay.<sup>6</sup> Where the evidence raised the inference of unreasonable delay, the carrier had the burden of proof to remove the presumption of negligence in transportation causing damage

4. *Clapp v. Am. Express Co.* (Mass. 1919), 125 N. E. 163.

5. *Clapp v. Am. Express Co.* (Mass 1919), 125 N. E. 163.

6. *P. C. C. & St. L. Ry. v. Home Ins. Co.* (Ind. 1919), 125 N. E. 426.

Under Act Cong. June 29, 1906, it is the duty of interstate carriers of live stock, such as mules, to feed and water the same at periods of 28 consecutive hours, which may be extended to 36 hours at the request of the shipper, and where the carrier failed to feed and water stock, and gave the shipper no opportunity until after the animals had been confined for more than 40 hours, such fact was evidence of the carrier's negligence on which a recovery for injuries to the animals, which ate off one another's tails and manes because of hunger, might be based. *Hines v. Morgan* (Ark. 1920), 218 S. W. 672.

The receipt of live stock by a railroad company, whose line connected with one over which the stock was being shipped, but formed no part of the through route, and the transporting of such stock with due diligence

to a reasonably convenient stockyard for unloading for feed, water and rest, held not a violation of the Twenty-Eight Hour Law (Comp. St. §8651), although the stock was confined longer than the time limited. *United States v. Cleveland, C. C. & St. L. Ry. Co.*, 262 F. 775.

The duty rested on an express company, carrying horses properly to care for, protect, and transport them as though there was no contract with the shipper entitling him or his agent to accompany the shipment, and under Act Cong. June 29, 1906, § 1 (U. S. Comp. St § 8651), the duty not to keep the horses in the car in excess of 36 hours, without unloading, feeding, and giving them rest *Gibson v. Adams Express Co.* (Ia. 1919), 175 N. W. 331.

In an action for damages sustained by negligent delay in the transportation of a trainload of cattle by a carrier in an interstate shipment from Vineyard, Tex., to Dickinson, N. D., where the connecting carrier received the same at Oakes, N. D., for delivery at a station near Dickinson, and, by its negligent delay at Dickinson where the cattle were in a

to a live stock shipment.<sup>7</sup> In an action for injuries to cattle thru delay in transportation, the connecting carrier, transporting an interstate shipment subject to the Carmack Amendment is liable for its negligent delay, occasioning loss through a rainstorm contributing thereto upon the unloading of the cattle at the destination, where it is shown in the record that the carrier, having knowledge of the condition of the cattle and the probable weather conditions, could reasonably have anticipated such loss as the probable result of its negligent delay.<sup>8</sup>

**Washouts.** Where traffic over the direct line of a railroad is rendered impossible by the submergence of part of the road, as the result of a crevasse, and a shipper of cattle directs that

weakened, hungry, and almost dying condition, so delivered the trainload at the destination that thereby, through existing weather conditions within 24 hours, a loss of over 100 cattle was occasioned, it is held that the findings of the trial court, determining that the defendant was negligent in the delay occasioned, and that such negligence was the proximate cause of the loss sustained, are justified upon the record. *Richards v. N. P. Ry.* (N. D. 1919), 173 N. W. 778.

7. *Mo. Pac. Co. v. Block* (Ark. 1920), 218 S. W. 682.

In *Burgher v. Wabash Ry. Co.* (Mo. 1920), 217 S. W. 854, the court said:

"This was an interstate shipment and is governed by the federal law. Our statute (Laws of 1913, p. 177), which makes mere proof of delay beyond a reasonable time prima facie evidence of negligence, is not applicable. The burden of proving negligence, in this case, was on the plaintiff. *Baker v. Schaff*, 211 S. W. 103; *McMickle v. Wabash Railway Co.*,

209 S. W. 611. However, it was only necessary that such sufficient circumstances be shown to raise a slight inference of negligence on the part of the railroad company. *McFall v. Rd.*, 181 Mo. App. 142, 168 S. W. 341. It has never been held that the mere showing of delay without explanation gives rise to a presumption of any negligence on the part of defendant. Some cause for the delay must be shown by plaintiff unexplained by defendant. *McFall v. Rd.*, *supra*; *Muir v. Rd.*, 168 Mo. App. 542, 154 S. W. 877; *Lay v. Rd.*, 157 Mo. App. 467, 469, 138 S. W. 884; *Bushnell v. Rd.*, 118 Mo. App. 618, 94 S. W. 1001; *Anderson v. Rd.*, 93 Mo. App. 677, 679, 67 S. W. 707; *McMickle v. Wabash Ry. Co.*, *supra*. This court said in *Winslow v. Rd. Co.*, 170 Mo. App. 617, 622, 157 S. W. 96, 98:

"Delays are more often due to accidental or necessitous causes than to negligence, and it requires proof of more than mere delay to raise an inference of negligence."

8. *Richards v. N. P. Ry.* (N. D. 1919), 173 N. W. 778.

they be sent by a circuitous and longer route, he has no just cause of complaint that their transportation requires more time, and that they are more "drawn" upon their delivery than they would have been if carried by the shorter route.<sup>9</sup> A special contract between a common carrier and a shipper, made in view of an unusual flood, for the immediate and necessary removal of perishable goods beyond the reach of the flood, is not per se void unless its terms are unjust, unreasonable, or discriminatory in their nature or in their operation.<sup>10</sup> (State shipment.)

**Freezing.** The fact that perishable produce is shipped under option No. 1 does not relieve a carrier from liability for freezing when occasioned thru negligent delay in transportation.<sup>11</sup> In this case the court said:<sup>12</sup> "It is certainly proper, in determining the reasonableness of the time consumed in shipping any commodity, to consider, among other circumstances, the nature of the goods and their liability to be affected by variations of temperature. 4 R. C. L. § 207; 10 C. J. 286; 2 Hutchinson on Carriers (3d Ed.) § 652. In the instruction given, however, the jury was practically told that the perishable character of the goods was not to be considered as a circumstance in determining the reasonable time. This error was not corrected

9. *Neely v. T. & P. Ry.* (La. 1919), 82 So. 745.

10. *B. & O. R. R. v. Armstrong, Lee & Co.* (O. 1919), 124 N. E. 186.

11. *Barnes Co. v. N. P. Ry.* (N. D. 1919), 173 N. W. 943.

Where a carrier receives perishable goods, namely, potatoes, for shipment at a season of the year when it is reasonable to anticipate freezing temperature; and where, following a delay in the shipment, the goods are damaged by being subjected to a freezing temperature, it is held:

(1) The perishable nature of the goods is a fact to be taken into consideration by the jury in determining whether or not there was an unreasonable delay in the shipment.

(2) Where goods are shipped under an option, whereby the shipper assumes the risk of damage from heat and cold, the carrier is not relieved from liability, where its delay in the shipment is the proximate cause of loss or damage by freezing.

(3) A carrier is not exempted under the rule which excuses it from liability for damage occasioned by an act of God, where perishable goods are damaged by freezing, following an unreasonable delay in their shipment, at a season of the year when it was reasonable to anticipate freezing temperature. *Barnes Co. v. N. P. Ry.* (N. D. 1919), 173 N. W. 943.

12. *Barnes Co. v. N. P. Ry.* (N. D. 1919), 173 N. W. 943.

or cured in the remaining portion of the instruction, and we are of the opinion that the trial court properly recognized its error in granting the new trial. Counsel for the appellant argue, however, that, in shipping under option No. 1, it must be held that the shipper assumes all risk incident to heat and cold. If this contention be sound, the error, on account of which the new trial was given, would be error without prejudice. We do not agree with this construction of the option. Where the carrier negligently delays the shipment of a perishable commodity at a time of year when it is reasonable to anticipate that a delay will subject the commodity to a temperature that is apt to destroy it, and where such a result actually follows, the loss results from the negligent delay. In fact, the option itself implies that the shipper does not assume the risk of the carrier's negligence, for it does not attempt to excuse the carrier from liability for damage which is the direct result of the negligence. In our opinion, where the negligence is the proximate cause of the damage, the damage is, in the language of the option, the direct result of the negligence. But counsel contend that the destruction of the property, being due to the elements, is a loss thru what is commonly termed "an act of God," and that for losses so resulting no recovery may be had. But it is well settled that where loss due to changes in temperature occurs at a time when it is reasonable to anticipate such changes, the exemption is not applicable. 4 R. C. L. § 189. It is even held in some jurisdictions that the carrier is not exempted where, following a delay in their shipment, the goods are damaged by a so-called act of God which could not have been anticipated. See 4 R. C. L. § 194, and cases cited."

**Refrigeration.** Claimant shipped prunes from Provo, Utah, to Denver, Colo., in a refrigerator car, which arrived in a damaged condition. Upon arrival the floor of the car was covered with water, the prunes were wet and damaged and ice bunkers stopped with cinders. The court said:<sup>13</sup> "Appellants claim that the measure of damages should be based on the Pueblo market

13. Barry et al. v Los Angeles & S. L. R. Co. et al. (Utah 1920), 189, p. 71.

value. Evidence was offered by appellants to show what the prunes sold for at Pueblo. In the first place the evidence offered and excluded, an alleged record of sales of these prunes by King & Co., the Pueblo commission firm, was incompetent; and it was neither material nor relevant. The prunes had been shipped by the respondents to themselves as consignees at Denver. \* Respondents' agent sold them at Denver to the Pueblo firm, who shipped them to Pueblo from Denver, and the prunes were resold in small lots, not in carload lots. Respondents were selling and had sold in carload lots, buying them in one place and shipping to themselves in another. The evidence shows the respondents' agents sold them for all he could get at Denver. What King & Co., to whom respondents' agent sold the prunes, obtained for them can be and is of no concern in this case. If appellants' contention be sound, they might with equal force say that what the ultimate consumer paid should be regarded as the criterion, and that if any of those prunes sold at a retail stand at Pueblo at three for a dime the respondents should account for what their vendee's customers received for the prunes, and not what was received for the salvaged car lot at Denver by the respondents. The price taken is the wholesale or carlot price at which respondents sold, not the retail price at which the prunes may have sold. 10 C. J. 396, 397; *Texas & P. Ry. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. 366; *St. L., S. F. & T. Ry. Co. v. Adams*, 55 Tex. Civ. App. 245, 118 S. W. 1155. Denver, not Pueblo, was the destination of the shipment of prunes. It was in Denver where they were found in damaged condition and where respondents' agent sold them. It is the market value at the place of destination which is the criterion of value by which the amount of damages for injury to the goods is to be determined. 10 C. J. 385-396; *Bingham v. Railroad Co.*, 39 Utah, 407, 117 Pac. 606; *McCaul-Dinsmore Co. v. C., M. & St. P. Ry.*, 260 Fed. 835, — C. C. A. —. The court instructed the jury that if they found for plaintiffs they might return a verdict for a sum equal to the difference in the market value of the prunes in their damaged condition at Denver, Colo., at the time they arrived there and were ready for delivery to respondents, and their market value at the same time and place if they had not been damaged. In the same instruction, the jury were informed

that in determining the market value and the depreciation of the market value of the prunes in question, if any, by reason of their being in a damaged condition, if they found they were in a damaged condition, they might consider all of the facts and circumstances proven on the trial concerning their condition when received by the railroad company, and also when they arrived at Denver and were ready for delivery to the plaintiffs or their agent, and also what efforts, if any, were made by plaintiffs and their agent to market and sell the prunes after their arrival at Denver, and the price at which the same were sold. Criticizing the instruction to which we have referred, appellants say: 'The court assumes that there was a market value for prunes in a damaged condition at Denver, Colo., at the time the shipment arrived there, which market value we contend was not established. The court also most emphatically says to the jury in this instruction that the prunes were damaged, which, if it were true, would be a fact for the jury to determine.' 'The question of market value was submitted to the jury, and was a question for them to determine. The evidence indicates that prunes in a damaged condition in carload lots were absolutely unsalable at Denver, and that respondents' agent made a good sale when he sold the same to the Pueblo firm. It is difficult to conceive how the jury could have been misled by this instruction. The condition of the prunes upon their arrival at Denver was distinctly left to the jury. That the words 'if you find they were in a damaged condition' were not repeated as they might have been would not mislead the jury, and could not in the light of the instructions as a whole, and in view of all the evidence, constitute prejudicial error. When the instructions are taken as a whole, they afford no basis for reasonable criticism."

**Rough Handling.** Claimant shipped a plaster bust by express. It seems that he was a sculptor of thirty years' experience, who had frequently shipped plaster casts, and that he shipped this in the usual and ordinary way, properly labeled. In holding the carrier liable for damaging it, the court said:<sup>14</sup> "This action against a common carrier is for damages to a plaster of Paris model for a bust, shipped by the plaintiff from Boston to

14. *Noble v. American Express Co.* (Mass. 1920) 125 N. E. 598.

the Roman Bronze Works, at Brooklyn, New York. The judge of the municipal court found for the plaintiff. The only question is whether he erred in refusing to grant the defendant's first and second requests for rulings. Among the rulings which the judge gave, at the defendant's request, were these: 'The burden of proving the defendant's negligence is upon the plaintiff.' 'Unless there is some evidence by which it may be determined that it is more probable that the damage was caused by negligence of the defendant rather than because of the insufficient packing of a fragile article the plaintiff cannot recover.' Accordingly we must accept this as the law of the case for the purpose of passing on the exceptions. Due effect must also be given to the judge's rulings as to the evidentiary weight of selected parts of the testimony, although he might have refused to give those requests. See *Canney v. American Express Co.*, 222 Mass. 348, 110 N. E. 967; *Astell v. Laffey*, 222 Mass. 469, 111 N. E. 681. Nevertheless we cannot say that the finding of negligence was unwarranted, or inconsistent with the rulings given. To begin with there was ample evidence from the plaintiff and from the manager of the Roman Bronze Works, both experts in packing such articles for shipment, that the bust was secured and protected in a manner sufficient to guard it against all ordinary dangers of transit. It was wrapped in tissue and newspaper surrounded with excelsior, packed in a box made of ash wood reinforced with cleats, and the cover nailed down—all by the plaintiff himself. The box was delivered by him directly to the defendant, so that it was not handled by any intervening agency. It was marked 'This end up,' 'With great care,' 'Plaster cast,' 'Fragile.' This case was in good condition when it reached the foundry at Brooklyn; but when the bust was taken out it was discovered that the nose and mouth were broken, so that it could not be used as a model for a cast. It could be found that the damage was not done by the plaintiff in nailing the cover upon the box. And the judge was warranted in inferring, in the absence of any explanation, that the box, which was in the sole custody of the defendant, with notice of its fragile contents, was handled in so rough and careless a manner as to cause injury to the plaster of Paris model. Order dismissing report affirmed."

## CHAPTER IV.

### LIABILITY AFTER ARRIVAL AT DESTINATION.

**Negligent Acts in General.** Where an interstate carrier of live stock has contracted with the owner of stockyards, near, but not on, its line, to unload, feed, water, and rest the stock in transit, a connecting carrier, which transports the stock from such through line to the yards is not responsible for delay in unloading by the stockyards company, which in such case is agent of the through carrier.<sup>1</sup> And it is the duty of a terminal carrier serving a stockyards to unload cattle, with reasonable promptness.<sup>2</sup> And where it was the duty of a carrier to see that cars of live stock were unloaded with reasonable promptness, with reference to the surrounding conditions, failure to so do was negligence.<sup>3</sup>

**Conversion and Failure to Deliver.** In an action for conversion, direct testimony as to value is not indispensable, if there

1. *United States v. Cleveland, C. & St. L. Ry. Co.* 262 F. 775.

Defendant agreed, in consideration of money paid by plaintiff, to cable a credit of 1,000 rubles to Russia and remit, or forward, that sum to a designated person at a specified place "subject to the rules and regulations of the various post offices used in making the remittance." Held, that there was no absolute agreement to deliver the money, and that, when it had been duly mailed in Russia and had come back to defendant's agent undelivered, plaintiff was entitled to no more than the 1,000 rubles or their American equivalent at the current rate of exchange as of a time when

with due diligence defendant should have ascertained and reported non-delivery. *Ketcher v. Am. Express Co.* (N. J. 1920), 109 Atl. 741.

In an action against a carrier of live stock for the loss of hogs, which it was claimed resulted from the carrier's negligent failure to promptly unload them, the question of the carrier's negligence, as well as the shipper's contributory negligence in overloading the cars, held for the jury. *Belt R. & Stockyards Co. v. Hammond* (Ind. 1919), 124 N. E. 398.

2. *Belt R. & Stockyards Co. v. Hammond* (Ind. 1919), 124 N. E. 398.

3. *Belt R. & Stockyards Co. v. Hammond* (Ind. 1919), 124 N. E. 398.

is proof of the character, quality, and quantity of the injury from which the jury may properly estimate the loss or damage.<sup>4</sup> The innocent misdescription by a shipper of furs shipped, as dry goods, and so copied into the bill of lading, resulting in the lower rate applicable to dry goods being charged, does not relieve the carrier from liability in case of their loss, the bill of lading providing merely that the owner or consignee shall pay the freight and all other lawful charges accruing on the property, and if on inspection it is ascertained that the articles shipped are not those described in the bill of lading, the freight charges must be paid on the articles actually shipped.<sup>4\*</sup>

4. *Roth Coal Co. v. Louisville & N. R. Co.* (Tenn. 1919), 215 S. W. 404.

4½. *N. Y. C. R. R. v. Goldberg*, 39 Supreme Court 402.

On September 17, 1912, a firm of fur manufacturers in New York City caused to be delivered to defendant there for transportation to plaintiff at Cincinnati, Ohio, a case containing furs belonging to plaintiff of the value of \$693.75. When the case left the consignors' possession it was marked with the name and address of the consignee, and with the word "furs" conspicuously displayed. It was delivered to a local expressman, whose driver delivered it to defendant and made out a bill of lading which defendant signed and upon which the action depends. This bill of lading described the goods as "One case D. G." which admittedly means "dry goods." The misdescription was the driver's mistake, not made with any intent to fraudulently misrepresent the nature of the merchandise shipped. Defendants clerk who signed the bill of lading relied wholly upon the representations of the driver as to the contents of the case, not seeing the case itself; and, so far as appears,

no representative of defendant compared or had a convenient opportunity to compare the bill of lading with the marks on the case. At the time of the shipment the official freight classification filed with the Interstate Commerce Commission provided for a first-class rate for dry goods (65 cents per hundred pounds), and a double-first-class rate (\$1.30 per hundred) for furs. As a result of the misdescription in the bill of lading, freight was charged at the smaller rate applicable to dry goods, instead of the higher one applicable to furs. No valuation was placed upon the goods, and no question of limitation of liability to a stipulated value is presented.

Defendant admitted that it received the goods for transportation, and that they were stolen in transit and never delivered to the consignee.

Defendant insists that it is not liable in any amount for loss of the goods, because they were misdirected in the bill of lading. Reliance is placed upon a line of decisions in this court relating to the limitation of liability of an interstate rail carrier where goods are shipped at a declared value at a rate based upon value and

**Misdelivery.** Where a carrier, receiving a shipment billed for a station the name of which had been changed because of its similarity to the name of another station, sent the shipment to the wrong station, where it remained for two weeks, it was guilty of an act of negligence independent of that of the carrier from whom it received goods, and was liable in damages for delay.<sup>5</sup>

under a contract conforming to the filed tariff. *Adams Express Co. v. Croninger*, 226 U. S. 491, 509, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Kansas City Southern Ry. v. Carl*, 227 U. S. 639, 650, et seq., 33 Sup. Ct. 391, 57 L. Ed. 683; *Missouri, Kans. & Texas Ry. v. Harriman*, 227 U. S. 657, 670, 33 Sup. Ct. 397, 57 L. Ed. 690; *Great Northern Ry. v. O'Connor*, 232 U. S. 508, 515, 34 Sup. Ct. 380, 58 L. Ed. 703; *Atchison, etc., Ry. Co. v. Robinson*, 233 U. S. 173, 180, 34 Sup. Ct. 556, 58 L. Ed. 901; *Southern Railway v. Prescott*, 240 U. S. 632, 638, 36 Sup. Ct. 469, 60 L. Ed. 836.

The Appellate Division held that these cases did not go to the extent of relieving the carrier from all liability in case of a non-fraudulent misrepresentation as to the nature of the merchandise shipped, and that since there was no clause in the bill of lading exempting the carrier or limiting its liability in case of such a misdescription the carrier was defenseless.

Defendant's contention is that there is no responsibility for loss of the furs that were shipped because they were goods, not of the same, but of a different, character than those described in the bill of lading, and were goods for the transportation of which a higher rate was established by its filed schedules. Were there otherwise any difficulty in answering

this contention, it would be wholly relieved by the fact that the precise contingency was anticipated in the preparation of the form of the bill of lading and provided for by one of its conditions, which reads as follows:

"The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Held, clearly, the effect of this is that a misdescription of the character of the goods, not attributable to fraud, merely imposed upon the shipper or consignee an obligation to pay freight charges according to the character of the goods actually shipped, and did not affect the liability of the carrier for a failure to deliver the goods. *N. Y. Central v. Goldberg*, 39 Sup. Ct. 402.

5. *Gatlin et. al. v. Norfolk-Southern R. Co. et. al.* (No Car. 1920) 102 S. E. 779.

Under section 821, Rev. Laws of 1910, in order for a railway company to absolve itself from liability as an insurer of goods transported by it, it must deliver the property to the consignee at the place to which it

But a carrier is not liable for refusal to deliver goods shipped without surrender of the original bill of lading merely on telegraphic instructions from the consignee, who was also the consignor, without reasonable identification and indemnity furnished to the carrier.<sup>6</sup> Where a shipper signed the bill of lading as agent for another and retained it as security for payment for the goods shipped, which were consigned to his principal, the carrier was liable for delivery requested by the principal without requiring surrender of the bill of lading, especially where the request indicated that there was a shipper who had to be consulted.<sup>7</sup> The refusal to deliver without the bill of lading by a terminal carrier on receipt of a message from the initial carrier directing such delivery held a breach of duty on the part of the terminal carrier for which the initial carrier might be held liable under the Carmack and subsequent amendments to the Interstate Commerce Act.<sup>8</sup>

**Notice to Consignee.** Where an express company notified the owner on October 20th that his goods were held at his risk and would be sold at public auction if disposition was not given by November 16th, and on November 11th the owner acknowledged receipt of the notice and requested the express company to deliver the goods to him, and on November 13th the express company wrote the owner that the goods had been shipped to another point, and on November 23d that they had been sold, the express company was liable in conversion.<sup>9</sup> In *Y. & M. V. R. R. v. Nichols and Co.* (Miss. 1919), 83 So. 5, the court said: "Appellees as plaintiffs in the trial court sued to recover the value of 31 bales of cotton delivered by them to appellant railway company at Alligator, Miss., to be transported and delivered to Godlett & Co., Memphis, Tenn. The record shows that W. B. and F. M. Nichols are partners in the cotton planting business and annually

is addressed, in the manner usual at that place. *Wichita Falls & N. W. Ry. Co. v. J. J. Brown Co.* (Okla. 1919), 183 Pac. 889. (State shipment.)

6. *Winget v. Grand Trunk Western Ry. Co.* (Mich. 1920), 177 N. W. 273.

7. *Winget v. Grand Trunk Western Ry. Co.* (Mich. 1920), 177 N. W. 273.

8. *McCotter v. N. So. Ry.* (N. C. 1919) 100 S. E. 326.

9. *Buften v. So. Express Co.* (Mo. 1920), 217 S. W. 630.

shipped their cotton over the lines of the defendant company, the only railroad company doing business at Alligator. Appellees, the owners of the cotton sued for, had their cotton ginned at Parks' gin at Alligator. On the 2d day of November, 1917, they made application for a car, and on the morning of Saturday, November 3d, the car was placed and about noon of the same day loaded with the 31 bales of cotton. Plaintiffs procured a bill of lading from the agent at 1:30 p. m., and thereafter considered the goods delivered to the carrier. The car was placed and the cotton was loaded upon a side track which leaves the main line of the railroad company about 60 feet south of the depot platform and runs in a southeastward direction along by Parks' gin, approximately a distance of about 1,000 feet. This side track was originally constructed by appellant company under a written contract with Mr. J. C. Rainer, former owner of the gin. The contract is in evidence, bears date October 14, 1901, and provides, in brief, that Mr. Rainer should furnish the right of way, and that appellant would lay and construct the track and furnish all needed material and thereafter be the owner of the track with the right to take up and remove the same, and that appellant furthermore is to have the 'exclusive possession and the quiet and peaceable enjoyment thereof' as long as the agreement should be in force. It appears that this gin track and one other track, referred to in the record as the 'house track,' extending alongside the freighthouse, were for many years the only tracks in the town of Alligator. Subsequently another track was constructed down by the gin of one Kline. There is evidence tending to prove that the Parks gin track and the railway company's house track along the depot furnished the facilities for handling incoming and outgoing freight, and that between 50 and 75 per cent. of all carload shipments were handled on the side track leading by Parks' gin; that the shipping public used the gin track, and to this end a track scale was placed on this gin track. Appellees had no proprietary interest either in the gin or the side track upon which their cotton in question was loaded. The evidence further tends to show that the gin platforms held most of the cotton, and that it was from the gin platforms that most of the cotton in Alligator was shipped. Parks' gin is a public gin, and the agent of the defendant company would honor the requisition of any shipper who desired to

load or unload cotton at this gin. The carload of cotton sued for was destroyed by fire about 4 o'clock p. m. on Sunday, the day following the issuance of the bill of lading. There is evidence that a local freight train headed north passed Alligator between 3 and 4 o'clock Saturday afternoon after the signing and delivering of the bill of lading; but the evidence further tends to show that the local agent was busy in and about his duties, and for that reason did not arrange to have the car pulled out and attached to that regular train. The fire originated in the gin, but the evidence fails to show how or by whom it was started. It is fair to assume that the fire originated through no fault of either party to this suit. It spread rapidly to the cotton platform, was communicated to the loaded car, and the car and its contents were burned. There is evidence as to the efforts made by both parties to move the car to a place of safety and avert a loss, but the view which we take of the whole case renders it unnecessary to detail this testimony. The uniform bill of lading was issued in this case, and among other provisions, contains the following paragraph: 'Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, and when received from or delivered on private or other sidings, wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.' There is no dispute as to the amount or value of the cotton sued for. The circuit judge instructed the jury peremptorily to find for the plaintiff for the value of the cotton, as also the sum of \$91.44 freight, and, from the judgment rendered in pursuance thereof, this appeal was prosecuted. On behalf of the appellant, it is contended in the main that the quoted stipulation in the bill of lading is valid and binding, is supported by a valuable consideration, and provides a reasonable limitation of the carrier's liability in the premises; that the side track upon which the car was loaded is embraced in the phrase 'private or other sidings' in section 5 of the bill of lading; that the track was a private siding within the meaning of the phrase, but, if appellant is mistaken in this, that the phrase is broad enough to cover this case. For appellees it is contended that the quoted provision of the bill of lading has application only to those stations at which there is no regularly appointed agent;

but, if mistaken in this, appellees contend that the side track is not one contemplated by the phrase 'private or other sidings,' but in fact was a part of the terminal facilities of appellant company at the small station of Alligator. Held, it affirmatively appears that the defendant maintained at Alligator a regular freight agent, and that most of the carload shipments were received from the siding in question. Whatever differences may exist as to the construction to be placed upon the quoted provision in the bill of lading, we prefer and adopt as the more reasonable view the construction which the Supreme Courts of California and West Virginia have placed upon this paragraph in the uniform bill of lading. *Jolly v. A., T. & S. F. Railway Co.*, 21 Cal. App. 368, 131 Pac. 1057; *McClure v. Norfolk & W. Railway Co. (W. Va.)* 98 S. E. 514. Under this view the paragraphs should be construed as a whole, and the phrase 'at which there is no regularly appointed agent' should be held to qualify the last clause as well as the first clause of the provision. If there is a reasonable doubt as to the true interpretation to be given this clause of the bill of lading, we are justified in construing the contract more strongly against the defendant. It will be observed that the paragraph is written and must be read as a whole, and that the word 'property,' the first word used, is the subject of the entire paragraph; that the so-called 'last clause' of the provision is separated from the first by a comma, and by proper grammatical construction this last clause, in reference to property received or delivered on private or other sidings, wharves, or landings, has application only to those places where there is no regularly appointed agent. As well stated by the Supreme Court of West Virginia in the *McClure Case*: 'The terms, "private or other sidings," in the last clause, necessarily means private or public sidings, because all railroad sidings fall in one or the other class.' The word 'private' is contradistinguished from 'public.' It is difficult to conceive of a siding that might be termed semi-private or quasi private. The entire provision is designed to release carriers from liability at all places where there is no regularly constituted agent until the property has been received into the actual as distinguished from the constructive possession of the carrier and when delivered out of the actual possession of the railroad companies at such points. The first stipulation is to the

effect that property taken from a station, wharf, or landing at which there is no regularly appointed agent is at owner's risk until loaded upon cars, regardless of whether such property is received on a main or side track, and furthermore, if received at private or other sidings in carload lots, the same is at owner's risk at all places where there is no regularly appointed agent until the cars are attached to trains. Heavy freight, such as cotton and lumber, and indeed the greater portion of freight shipped in carloads, must be received on sidings of some nature. The wholesale business of the nation is handled from side tracks, whether they be termed industrial switches, team tracks, or sidings. If then appellant's contention on this appeal is the true one, interstate carriers have successfully relieved themselves of all responsibility for theft, fire, or damage to the bulk of the freight handled in carload shipments, except only when regular trains have been made up for regular movements between stations, and furthermore under such view a large per cent of the shipping public, having no proprietary interest in sidings and no opportunity to protect carload shipments consigned by or to them, are without protection. The quote provision refers as much to property delivered on 'private or other sidings' as property received. It is a matter of common observation that consignees do not know, and cannot know, the exact time of arrival of freight consigned at a particular station or siding, and frequently have to be notified by a local agent of the arrival and placing of the car. If the mere placing of a consigned car on a side track exempts the carrier from further liability, then railroad companies have an easy way of discharging their common-law duty safely to transport and deliver freight. In the present case, the testimony shows that appellees have no proprietary interest in the gin track, and therefore had no control over the car until after it had been loaded and the bill of lading issued. Prima facie the issuance of a bill of lading is acceptance of the freight, and, upon receiving the bill of lading under circumstances disclosed by the present record, the shipper would ordinarily go about his business and leave the protection of the car to the carrier. But there are many instances where railroad companies in an honest effort to serve the public agree to receive, or take up, and to deliver freight at flag stations and at other points on

the main line where there is no regularly appointed agent and sometimes upon sidings where there is no agent. At such places it is reasonable for the carrier to limit its liability for property received or delivered in accordance with what we believe to be the proper construction of the bill of lading here under review. As stated by the Supreme Court of West Virginia: 'There is as much, if not more, danger that property not loaded into cars would be destroyed or carried away, than there is after it has been loaded, and therefore no reason for making the distinction contended for by counsel for defendant in the application of the provision.'"

**Order—Notify Shipment.** In a shipment "to order of consignor notify," title remains in the shipper, who has control of the shipment as to route, destination, and delivery unless by assignment of the bill of lading or other contract for value creating an interest in the goods he had deprived himself of his rights.<sup>10</sup> Where a terminal carrier delays delivering a car of potatoes until an order notify bill of lading is produced, although the initial line directs it to deliver without surrender of the bill of lading, and because of such delay in delivery the shipment freezes, the carrier is liable therefor.<sup>11</sup>

10. *McCotter v. N. So. R. R.* (N. C. 1919), 100 S. E. 326.

11. *McCotter v. No. So. Ry.* (N. C. 1919), 100 S. E. 326.

## CHAPTER V.

### LIABILITY FOR NEGLIGENCE.

**In General.**<sup>4</sup> Though just and reasonable conditions may be imposed limiting the common-law liability of a carrier, he cannot be relieved when the goods are lost or destroyed during carriage through his own negligence or the negligence of his servants or agents, though the contract of shipment may exonerate him in terms.<sup>1</sup> A stipulation exempting a carrier from loss by leakage of the goods is reasonable and enforceable.<sup>2</sup> Where, under the bill of lading, both the initial and terminal carrier by water of a shipment of oil were exempted from liability for leakage, the shipper, to recover, had the burden to prove that the leakage which occurred was caused by the active negligence

½. In *Burgher v. Wabash Ry. Co.* (Mo. 1920), 217 S. W. 854, the court said:

"The hogs were shown to have been cool and in good condition at Ferguson, a suburb of the city of St. Louis, at about 7 a. m. on June 27th. When the hogs arrived at the stockyards, the hog was dead, showing evidence of having become overheated. The weather was hot. The defendant was an insurer of the hog (*Libby v. Rd.*, 137 Mo. App. 276, 280, 117 S. W. 659), but was excused if it died from its own inherent weakness or vice, but this excuse must be pleaded and proved by the defendant (*Boyd v. St. Louis Express Co.*, 211 S. W. 702; *Cudahy v. A., T. & S. F. Rd. Co.*, 198 Mo. App. 520, 523, 201 S. W. 623). There is nothing in the evidence introduced in behalf of plaintiff

that the hog died as the result of its own inherent vice or weakness. On a retrial, defendant's defense to the killing of the hog will be availing only if it pleads and proves that the hog died of its inherent vice or weakness. Of course, defendant is required to use ordinary care, taking into account the characteristics of the animal and the weather. 6 Cyc. 437; *Bilby v. Rd.*, 184 Mo. App. 644, 171 S. W. 39."

1. *Florida Cotton Oil Co. v. Clyde S. S. Co.* (Mass. 1920), 125 N. E. 855.

The liability of a bailee for loss of goods depends on negligence. *Stevenson & Co. v. Hartman*, 181 N. Y. S. 465.

2. *Florida Cotton Oil Co. v. Clyde S. S. Co.* (Mass. 1920), 125 N. E. 855.

of one carrier or the other.<sup>3</sup> While common carriers have duty of carrying all goods offered to them in the usual course of business, a carrier could not at common law, in absence of special contract, be compelled to receive goods to be carried to points beyond its own line, or to transport such goods beyond its own line or over the tracks of a connecting carrier.<sup>4</sup> Under the Carmack Amendment, a bill of lading on an interstate shipment of live stock issued by the initial carrier is binding on the shipper and all connecting carriers, just as the rate properly filed by the initial carrier is binding on them; so connecting carriers, though they insisted as a condition of carrying the shipment further that the shipper accept and sign a new bill of lading, may rely on a provision in the original bill of lading limiting the time for action, though the bills they issued contained no such limitation.<sup>5</sup> And the Interstate Commerce Act, making a carrier liable for injury to goods while in hands of a connecting carrier, a carrier could not avoid such liability by any provision of a bill of lading limiting its liability.<sup>6</sup> So a carrier's liability as

3. *Florida Cotton Oil Co. v. Clyde S. S. Co.* (Mass. 1920), 125 N. E. 855.

4. *State Public Utilities Com'n. v. Pittsburgh, C. C. & St. L. R. Co.* (Ill. 1919), 125 N. E. 485.

5. *Texas & P. Ry. Co. v. Leatherwood*, 39 S. Ct. 517.

6. *West. Elec. Co. v. N. Y. & B. Transp. Line*, 180 N. Y. S. 873.

Plaintiff shipped his household goods and live stock from Sulphur to Durant in a car chartered from defendant company. By the terms of the contract plaintiff was entitled to ride in the caboose free of charge, but providing that he should not go on or be on any freight car while switching was being done. The car so chartered reached Madill, an intermediate point, about dark, and was side-tracked in order to be taken on another and different road to Durant the follow-

ing morning. Between 9 and 10 o'clock p. m. plaintiff and another party went into the car, as alleged by plaintiff, for the purpose of caring for the live stock and nailing up a partition, this work consuming about 30 minutes. The parties then lay down. Some time after 12 o'clock plaintiff arose and again commenced nailing on the partition. While so engaged the car received a sudden jar or bump occasioned by the switching. One of the horses was thrown against the partition with sufficient force to break down same. The plaintiff was thrown against a buggy, resulting in an injury to his back. But there was nothing in the evidence tending to prove defendant knew plaintiff was in the car at the time. Held, no evidence from which negligence on the part of defendant could be inferred. *St. L. & S. F. Ry. v. Manley* (Okla. 1920), 189 Pac. 177.

an insurer continues for 48 hours after arrival.<sup>6a</sup> Under a bill of lading providing that "property not removed" within 48 hours after notice of its arrival may be kept in car subject to a reasonable charge for storage and carrier's liability as warehouseman only, etc., a carrier was liable as an insurer for loss of goods occurring within 48 hours after notice to the consignee, even though the consignee broke the seals, accepted the shipment and began unloading the car.<sup>6b</sup> A common carrier is liable

6a. *Mark Owen & Co. v. M. C. R.* (Ill. 1920), 125 N. E. 767.

6b. *Mark Owen & Co. v. M. C. R.* (Ill. 1920), 125 N. E. 767.

The first section of the bill of lading, as we read and understand it, limits appellant's liability as a carrier to the period of 48 hours after notice "sent or given" of the arrival of the property at its destination. For loss occurring after 48 hours from the time of arrival and notice the liability is that of warehouseman only. Section 5 provides that "property not removed" within 48 hours after notice of its arrival may be kept in car, depot or place of delivery of the carrier, subject to a reasonable charge for storage and the carrier's liability as warehouseman only, or, at the option of the carrier, it may be stored in a warehouse at the cost and risk of the owner, without liability on the part of the carrier, subject to a lien for freight and storage charges.

Appellant insists the bills of lading were designed to put a limit on its liability as a carrier in any event, but that such liability ended before the expiration of that time, where, as in this case, the cars were placed on the public delivery team track, and appellee, after being notified, broke the seals, accepted the shipments, and

began unloading the cars. That does not appear to us to be the most reasonable construction of the language of the bills of lading. Section 5 says as to property "not removed" within 48 hours after notice—not property "not delivered" within that time—it may be kept in car, depot, or place of delivery, subject to a reasonable charge for storage and the carrier's responsibility as a warehouseman only. It would seem if it had been contemplated that the liability as carrier was to cease under the facts here stipulated, which it is insisted constituted a delivery, the language of the bills of lading might easily have made that intention clear. The ordinary mind would understand, we think, from reading the bills of lading, that although the car may have been placed for unloading, opened, and the work of unloading begun, the carrier's liability as such continued as to "property not removed" 48 hours, provided that was a reasonable time for unloading, and it is not disputed that 48 hours was a reasonable time for appellee to unload the cars. The municipal court held in a proposition of law that the cars were unloaded by appellee in a reasonable time, and that is not questioned by appellant.

The construction we have placed on the language of the bills of lading seems to us the reasonable one. The

for the loss of goods resulting from defects in a car belonging to another company and procured by the carrier for the particular shipment at the request of the shipper.<sup>6c</sup>

**Initial Carrier.** Despite the Carmack Amendment, in case of an interstate shipment wholly by water, the initial carrier is not liable for loss on the line of a connecting carrier, except under common-law rules.<sup>7</sup>

most that can be said is that their meaning is not clear. Certainly more is left to be implied or inferred if the construction contended for by appellant is given them than is required to construe them as we have done. The question of the construction of this form of bill of lading has been passed upon by three state courts. *McEntire v. Chicago, Rock Island & Pacific Railroad Co.*, 98 Neb. 92, 152 N. W. 305; *Gary Bros. & Gaffke Co. v. Chicago, Milwaukee & Puget Sound Railway Co.*, 49 Mont. 524, 143 Pac. 955; *Rustad v. Great Northern Railway Co.*, 122 Minn. 453, 142 N. W. 727. The court in the *McEntire* Case said of section 5 of the bill of lading that the more reasonable construction was that property not removed within 48 hours after notice of its arrival might be left in the car subject to a reasonable charge for storage, and the liability of the carrier should be that of warehouseman, only; that if the consignee had not opened the car and taken possession, but had left it on the side track in the condition received, the carrier would be liable as such 48 hours after notice of its arrival and after that time as warehouseman. In that case the consignee put his own padlock on the car and kept the key in his possession. In the *Gary Bros.* Case a car of potatoes froze within 48 hours

after placement and notice. The court held the carrier liable as such under the bill of lading 48 hours, and that it could only be released from such liability during that time by the removal of the potatoes. The same construction was given the same form of bill of lading in the *Rustad* Case, the court holding that under the contract the liability as carrier continued 48 hours, even if the law, in the absence of the contract, might have terminated sooner.

"We are of opinion the judgment of the Appellate Court was correct, and it is affirmed.

"Judgment affirmed."

*Mark Owen & Co. v. Michigan Cent. R. Co.* (Ill. 1920), 125 N. E. 767, 768.

6c. *N. C. & St. L. Ry. v. Hopper* (Tenn. 1919), 217 S. W. 661.

7. *Florida Cotton Oil Co. v. Clyde S. S. Co.* (Mass. 1920), 125 N. E. 855.

Plea of carrier, setting up provision of bill of lading absolving it from liability for loss to goods in hands of connecting carrier, as a defense in an action for damages for such loss, is frivolous and will be stricken, in view of Interstate Commerce Act, § 20, pars. 11, 12, as amended by Carmack Amendment, § 7, pars. 11, 12 (U. S. Comp. St. §§ 8604a,

**Connecting Carrier.** The Interstate Commerce Act, § 20, as changed by the Carmack and Cummins Amendments, making the initial carrier of property liable to the lawful holder of the bill of lading for the full actual loss, damage, or injury to the property caused by it, or by any connecting carrier under a through bill of lading, held also to govern the liability of such connecting carriers, and a provision of the bill of lading limiting liability to invoice value, which by the statute is made void as to the initial carrier, is also void as to the connecting carriers thereunder.<sup>8</sup> The Carmack Amendment did not deprive the shipper of any remedy he had under the common law against a connecting or terminal carrier. That amendment expressly provides that nothing therein shall deprive any holder of a receipt or bill of lading of any remedy or right of action he may have under existing law.<sup>9</sup> The Carmack Amendment, giving shipper a right of action against the initial carrier which issued the bill of lading, but providing that it should not deprive any holder of receipt or bill of lading of any remedy under existing law, does not deprive shipper of his common-law right to sue all carriers jointly.<sup>10</sup>

**Delivering Carrier.** Where a terminal carrier by water took a shipment of oil under bill of lading issued by the initial carrier stipulating against liability for leakage, such valid limitation in the bill of lading inured to the benefit of the terminal carrier.<sup>11</sup> Under the Carmack Amendment to the Interstate Commerce Act, a delivery of the shipment by the terminal carrier, whether as a carrier or as a warehouseman, is part of transportation, and, though the carrier is liable only as warehouseman, delivery without requiring surrender of the bill of lading makes the initial carrier liable to any holder

8604aa), making carrier liable for damages to goods in hands of connecting carrier. *West. Elec. Co. v. N. Y. & B. Transp. Line*, 180 N. Y. S. 873.

8. *Wabash Ry. Co. v. Holt et. al.* (1920), 263 F. 72.

9. *Barry et. al. v. Los Angeles*

& S. L. R. Co. et. al. (Utah 1920), 189 p. 73.

10. *Barry et. al. v. Los Angeles & S. L. R. Co. et. al.* (Utah 1920), 189 p. 71.

11. *Florida Cotton Oil Co. v. Clyde S. S. Co.* (Mass. 1920), 125 N. E. 855.

of the bill of lading injured thereby.<sup>12</sup> Refusal to deliver, without bill of lading by terminal carrier on receipt of message from initial carrier directing such delivery held a breach of duty on the part of the terminal carrier for which the initial carrier might be held liable under the Carmack and subsequent amendments to the Interstate Commerce Act.<sup>13</sup> Claimant shipped live stock from New York to points near Cleveland over the Lines of the New York Central Railroad. When the stock got to Cleveland, the New York Central employed the defendant, a switching carrier, to switch the cars to the Cleveland Union Stock Yards where they were to be unloaded, in accordance with the provision of the Twenty-Eight Hour Law. The switching charge of \$2.50 per car was paid which did not form part of the through rate. The Stock Yards Company failed to unload the shipments, so as to comply with the Twenty-Eight Hour Law and suit was brought against the switching carrier. The court said:<sup>14</sup> "These cases, it seems to me, settle the law that a terminal carrier, or any other carrier, may receive stock to be carried with due diligence to any reasonably convenient stockyard, for the purpose of being unloaded as required by law, without committing an offense; and this is true, even though the lines thus used may be part of a connecting line, which it is necessary to use in performing the original contract of interstate carriage. In the instant case, defendant as to three shipments merely permitted a section of its track to be used, and in two cases merely switched the shipment over its line from the New York Central Railroad Company's line to the Union Stockyards, with which the New York Central Railroad Company's line to the Union Stockyards, with which the New York Central had a contract to feed, water, and rest cattle in compliance with this law. The defendant, as well as the Stockyards Company, was an agency availed of by the New York Central Railroad Company to comply with the law. Its lines did not form any part of the line of road over which the cattle were to be conveyed

12. *Winget v. Grand Trunk Western Ry.* (Mich. 1920), 177 N. W. 273.

13. *McCotter v. Norfolk Southern*

R. Co., 100 S. E. 326.

14. *United States v. Cleveland C. & St. L. Ry. Co.* (Ohio 1920), 262 F. 775, 777.

from one state to another. If the failure of the Stockyards Company to perform the labor of unloading the stock with due promptness is a matter of importance, this failure must be imputed, not to the defendant, but to the New York Central, whose agency it was, and on which the duty rests to comply with the law." Where the facts were undisputed, the question whether the right to recover under the Carmack Amendment from an initial carrier for delivery of goods by the terminal carrier without requiring surrender of the bill of lading, is a recovery of liability as carrier or as warehouseman, is one of law for the court.<sup>15</sup>

15. *Winget v. Grand Trunk Western Ry.* (Mich. 1920) 177 N. W. 273.

## CHAPTER VI.

### ACTS RELIEVING CARRIER OF LIABILITY.

**Operation of Law.** In a shipper's action against carrier for conversion where the defense was that goods had been taken from carrier under a writ of attachment, the burden of establishing such defense was upon the carrier.<sup>1</sup>

**Inherent Character of Shipment.** The carrier being an insurer is liable for death of a hog in transit unless it died from its own inherent weakness or vice.<sup>2</sup> In an action by a shipper of mules which ate off one another's tails and manes, the animals being confined for more than 40 hours without food, etc., held, that the failure of the shipper to place chemicals on the animals' manes and tails was not negligence as a matter of law; there being no such universal practice as to make it a custom and the rules of the carrier not requiring such treatment.<sup>3</sup> Though a shipper of cattle cannot recover from the carrier for injuries which were the proximate result of weakness at time cattle were tendered for carriage, the carrier, having received cattle, is bound to exercise ordinary care, and to transport them with reasonable dispatch, and upon breach of such duty is liable for injuries proximately resulting therefrom, though results were more disastrous than if cattle had been in good condition.<sup>4</sup> The carrier to be excused from liability for death of a hog in transit must plead and prove that it died from its own inherent weakness or vice.<sup>5</sup>

1. *Gulf C. & S. F. Ry. v. McKee* 218 S. W. 672.  
(Tex. 1920), 217 S. W. 737.

2. *Burgher v. Wabash Ry.* (Mo. 1920), 217 S. W. 854.

3. *Hines v. Morgan* (Ark. 1920),

4. *Panhandle & S. F. Ry. v. Sanderson* (Tex. 1920), 218 S. W. 540.

5. *Burgher v. Wabash Ry.* (Mo. 1920) 217 S. W. 854.

## CHAPTER VII.

### FILING OF CLAIM.

**Notice of Loss.** The claimant brought suit for injury to a shipment of horses from Illinois to New York, which were injured by an engine pushing some cars against the shipment at destination when placed for unloading. The bill of lading contained a provision that notice of claim must be made within five days from the time the stock is removed from the car. This notice was not given as the claimants contended that the transportation had ended when the accident occurred and consequently no written claim was necessary. It did appear that the shipment had been left in the custody of claimant for unloading and that the transit had ended. The court said:<sup>1</sup> "Under our former opinions, the clause requiring presentation of a written claim is clearly valid and controlling as to any liability arising from beginning to end of the transportation contracted for. *Chesapeake & Ohio Ry. Co. v. McLaughlin*, 242 U. S. 142, 37 Sup. Ct. 40, 61 L. Ed. 207; *St. Louis, Iron Mt. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917; *Baltimore & Ohio R. R. Co. v. J. G. Leach*, 249 U. S. —, 39 Sup. Ct.

1. *Erie R. Co. v. Shuart et. al.* (1919), 39 Sup. Ct. 519.

A provision in a limited liability live stock contract or bill of lading for an interstate shipment, requiring presentation within five days from the time the stock is removed from the car or cars of claim for any loss or damage as a condition to recovery, is valid and controlling as to any liability of carrier arising from beginning to end of the transportation. *Erie R. R. v. Shuart*, 39 Sup. Ct. 519.

Though a car containing an interstate shipment of horses had arrived at its destination, and the consignees were proceeding to unload the animals through a cattle chute owned and operated by the carrier, the transportation was not complete, and, where the horses were injured when other cars were pushed against the one being unloaded, written claim of loss, made a condition to liability in bill of lading, must be given in order to support recovery against the carrier. *Erie R. R. v. Shuart*, 39 Sup. Ct. 519.

254, 63 L. Ed. — (Decided March 10, 1919); *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Dettlebach*, 239 U. S. 588, 593, 594, 36 Sup. Ct. 177, 60 L. Ed. 453; *Southern Ry. v. Prescott*, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836. In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Dettlebach* we pointed out that the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584) enlarged the definition of "transportation" so as to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, or icing, storage and hauling of property transported,' and we said from this and other provisions of the act "it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the act respecting reasonable rates and the like.' In the instant case, when injured, the animals were awaiting removal from the car through a cattle chute alleged to be owned, operated and controlled by the railroad. If its employes had then been doing, the work of unloading there could be no doubt that transportation was still in progress; and we think that giving active charge of the removal to respondents, as agreed, was not enough to end the interstate movement. The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading although the shippers had contracted to do the work of actual removal. See *Hutchinson on Carriers*, §§ 711, 714, 715." The provisions of the Interstate Commerce Act, that no notice of claim or filing of claim shall be required where loss, damage, or injury is due to delay or damage while being loaded or unloaded, or damage

in transit by carelessness or negligence, had no application where the claimant predicated liability solely on the carrier's failure to safely transport live stock without asserting carelessness or negligence.<sup>3</sup> The giving of notice in writing of loss or injury to an interstate shipment of live stock and the filing of notice that claim would be made and of the itemized claim as required by the bill of lading were not dispensed with by the railroad's agent's knowledge of the loss or injury.<sup>3</sup> Provisions of a bill of lading covering an interstate shipment of live stock requiring notice of loss or injury to be given in writing, and notice that claim would be made filed within 95 days, and verified itemized claim filed within 125 days are valid.<sup>34</sup> Where a damaged shipment had been made September 12th, the action of the shipper's broker, on December 29th, in filing with the terminal carrier full notice of claim, etc., held a full compliance with the requirement of the contract that claim be presented at the point of delivery or origin within four months.<sup>4</sup> A provision in a limited liability live stock contract or bill of lading for an interstate shipment, requiring presentation within five days from the time the stock is removed from the car or cars of claim for any loss or damage as a condition to recovery, is valid and controlling as to any liability of carrier arising from beginning to end of the transportation.<sup>5</sup>

**Manner and Form of Giving Notice.** Where a damaged shipment had been made September 12th, the action of the shipper's broker, on December 29th, in filing with the terminal carrier full notice of claim, etc., held a full compliance with the requirement of the contract that claim be presented at the point of delivery or origin within four months.<sup>6</sup>

2. *Cunningham v. Missouri Pac. R. Co.* (Mo. 1920), 219 S. W. 1003.

3. *Cunningham v. Missouri Pac. R. Co. et. al.* (Mo. 1920), 219 S. W. 1003.

3½. *Cunningham v. Mo. Pac. R. Co.* (Mo. 1920), 219 S. W. 1003.

4. *McCotter v. N. So. Ry.* (N. C. 1919), 100 S. E. 326.

5. *Erie R. Co. v. Shuart et. al.* (1919), 39 Sup. Ct. 519 and 520.

6. *McCotter v. Norfolk Southern R. Co.*, 100 S. E. 326.

**Waiver of Notice.** Provisions of a bill of lading covering an interstate shipment of live stock requiring the giving and filing of notice and of a verified claim within times specified could not be waived, as this would open the door to discrimination and favoritism.<sup>7</sup>

7. *Cunningham v. Missouri Pac. R. Co. et. al.* (Mo. 1920), 219 S. W. 1003.

Claimant shipped cattle for National Stock Yards, Ill., to Fisk, Mo., which arrived two heads short. The shipping contract provided that notice of claim would be filed within 95 days and statement of claim within 125 days, for loss or injury incurred. This was not done and it was contended that this provision was waived. The court said:

"It is fair to say that plaintiff does not question but that, since this is an interstate shipment governed by the Interstate Commerce Act and the federal decisions interpreting and applying that act, a provision of a shipping contract such as we have here is valid and binding. This has been so often held as no longer to be debatable. *Grain Co. v. Railroad*, 177 Mo. App. 194, 164 S. W. 182; *Dunlap v. Railroad*, 187 Mo. App. 201, 172 S. W. 1178; *McElvain v. Railroad*, 176 Mo. App. 379, 158 S. W. 464; *Smith v. Railroad*, 186 Mo. App. 401, 171 S. W. 635.

"The federal decisions on which this rule is based are referred to in the cases cited and those below mentioned. By reference to these cases it will be found that provisions requiring notice of loss or damage to be given within a very short period, even one day, have been upheld and liability denied for failure to do so. This doubtless led to the amendment

of 1915 prohibiting shipping contracts from fixing a shorter period than 90 days for giving notice of claims and a shorter period than 4 months for the filing of claims. See: 8 U. S. Compiled Statutes, p. 9254; also volume 8, § 8604a, p. 9289. The contract provision here in question complies with these provisions.

"The serious question here raised is as to whether such notice is not dispensed with under the facts here shown. The courts, as have the parties here, have discussed this as a question of waiver. We would have no difficulty in saying that common carriers could not be allowed to waive provisions of this character without opening wide the door of discrimination and favoritism. Anything that shows a willingness and intention to abandon or forego a right or privilege amounts to a waiver, and, if the carrier can waive such notice at will, it can accept the notice as sufficient at a later date or dispense with it altogether. The important question is whether or not actual knowledge of the damage or loss by the person, agent of the railroad to whom the notice is given, such knowledge being evidenced in this case by the local agent indorsing the fact on the bills given to the shipper at the time the stock was delivered, does not dispense with the formal notice otherwise required. A number of cases have so held. The Supreme Court of North Carolina (1916) in Washing-

ton Horse Exchange v. L. & N. Ry., 171 N. C. 65, 70, 87 S. E. 941, 943, said:

"The requirement in an interstate bill of lading that notice of damage to live stock shall be in writing is waived [dispensed with] by actual knowledge on the part of the carrier of the injury. \* \* \* The rule permitting knowledge to supply the place of written notice, being a mode of proof, applicable alike to all railroads and in favor of all shippers, and enforced against a carrier who has had possession, with every opportunity to know the extent of the injury and its cause, is not a discrimination between railroads, nor a preference in favor of a particular shipper at the expense of others."

"That ruling was adhered to by the same court in *Schloss-Bear-Davis Co. v. L. & N. R. Co.*, 171 N. C. 350, 88 S. E. 476. Such also is the holding of the Supreme Court of Mississippi (1917) in *Ill. Cent. R. Co. v. Bauer*, 114 Miss. 516, 75 South. 376, the Illinois Court of Appeals (1915) in *Doster v. Railroad*, 196 Ill. App. 49, and the Court of Appeals of Kentucky (1917) in *Baltimore & O. R. Co. v. Leach*, 173 Ky. 452, 191 S. W. 310. This last case was decided after the decisions of the Supreme Court of the United States in *Phillips v. Grand Trunk Ry.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, and *Georgia, F. & A. Ry. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, and states that such cases do not hold a contrary rule. The Kansas City Court of Appeals, however, in *Banaka v. Mo. Pac. Ry.*, 193 Mo. App. 345, 186 S. W. 7, held that an interstate carrier could not waive the provisions of a shipping contract

requiring notice of loss of damage, basing its ruling on *Phillips v. Grand Trunk Ry.*, *supra*. The same court, in *Kemper Mill Co. v. Mo. Pac. Ry.*, 193 Mo. App. 466, 186 S. W. 8, ruled that actual knowledge of the loss or damage on the part of the carrier did not dispense with the notice required by the shipping contract. The court there said:

"But plaintiffs seek to avoid that part of the contract on the ground of its being inapplicable to the character of loss suffered in this case. We held in *Banaka v. Missouri Pacific Ry. Co.*, at our last sitting, and not yet reported [193 Mo. App. 345, 186 S. W. 7], not only that such contracts were valid, but in interstate shipments they could not be waived. Plaintiff insists that the railway company purposely delivered the property to a party not entitled to receive it and took a bond to indemnify it for all damage it might be compelled to pay by reason of such irregular delivery, and that notice to a person that he has committed an act he himself avows and for which he has taken indemnity cannot reasonably be within the intentment of the contract. Plaintiff asks that, if a carrier should willingly and wrongfully refuse to deliver to the consignee a shipment which had duly arrived, could there be any reason in giving him notice of such refusal? These objections, substantially, were disallowed in a late case in the Supreme Court of the United States. *Ga., Florida & Ala. Ry. Co. v. Blish Milling Co.*, May 8, 1916."

"This case is followed in *Cudahy v. Railroad*, 198 Mo. App. 520, 526, 201 S. W. 623, where the court held that knowledge of the damaged con-

dition of the goods did not dispense with the notice, since the notice required must be one of a claim or intended claim for damages, and not merely that the shipment was damaged. This decision is based on *St. L. I. M. & S. Ry. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 468, 61 L. Ed. 917. See, also, *Blair-Baker Horse Co. v. Atchison, T. & S. F. R. Co.*, 200 S. W. 109; *O'Briant v. Pryor*, 195 S. W. 759; *Cudahy Pack. Co. v. Railroad*, 201 S. W. 596; *Cudahy Pack. Co. v. Bixby*, 199 Mo. App. 589, 205 S. W. 865. We think these decisions are in accord with the rulings of the Supreme Court of the United States and are correct.

"We note that the amendment of 1915 to the Interstate Commerce Act heretofore mentioned contains the following limitation with reference to requiring notice of loss:

"Provided \* \* \* that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damaged

in transit by carelessness or negligence, then no notice of claim or filing of claim shall be required as a condition precedent to recovery.'

We find no case construing or applying this proviso. It cannot, however, be applied here, for the reason that the plaintiff does not base his claim on delay or damage while his stock was being loaded or unloaded or on damage in transit by carelessness or negligence. Nothing is averred or shown as to negligence, carelessness, or delay in this shipment. The plaintiff predicates liability solely on defendants' failure to safely transport his property. *Collins v. Railroad*, 181 Mo. App. 213, 217, 167 S. W. 1178; *Cudahy Pack. Co. v. Railroad*, 198 Mo. App. 520, 524, 201 S. W. 623. Had plaintiff presented a case based on negligence, a different proposition would be presented.

*Cunningham v. Missouri Pac. R. Co. et. al.* (Mo. 1920) 219 S. W. 1003.

## CHAPTER VIII.

### DAMAGES RECOVERABLE.

**In General.** A litigant should not lose his property, or be required to pay his money as damages, when his liability for such damages rests only on inference, especially where the fact necessary to establish liability, if it existed, was within the exclusive knowledge of the opposing party, who testified in the case and failed to state such fact.<sup>1</sup>

1. *Western Union Tel. Co. v. Mobley* (Tex 1920) 220 S. W. 611.

Plaintiffs below are the receivers of a corporation, which had a contract with another concern for the sale and delivery to it of sulphuric acid. The contract was to supply the requirements of the corporation represented by the receivers over a term of years and up to a given amount, but the price remained the same during the life of the contract. Some years after the date of contract a shipment was made thereunder from a point in Illinois to one in Indiana, and so routed that the initial carrier was the New York Central Railroad, and a connecting carrier the defendant herein—the Wabash Railway.

The goods were lost under circumstances admittedly creating liability on the part of the Wabash and the question involved herein is whether the amount to be paid by the Wabash shall be the invoice value of the acid or the market value of the same. Owing to the rise in price at and during the war with Germany, the

invoice value, or the amount under the contract aforesaid to be paid for the acid was but \$467.98 whereas the market value at the time and place of shipment was \$3,034. On stipulated facts the matter was submitted to the court below, which ordered judgment for the market value. On appeal this decision was affirmed. *Wabash Ry. Co. v. Holt et. al.* (1920) 263 F. 72 & 73.

In an action against carrier for damages to a shipment of hogs, where the second paragraph of complaint based on Burns' Ann. St. 1914, §§ 3918-3920, and section 3920b, relating to initial liability, it was proper to instruct that the latter statute did not affect the validity of shipping contracts limiting liability, unless attempting to limit to damages on shipper's own line was proper. *Jackson v. Mauck* (Ind. 1920) 126 N. E. 851.

In an action by a shipper of mules for damages, the animals having eaten off one another's tails and manes because confined for an excessive

**Exchange Bill of Lading.** Claimant shipped in 1913 horses from New Mexico to Texas under a bill of lading which provided that suit had to be brought within six months after the loss occurred. When the horses reached the lines of certain connecting carriers, these carriers made the shipper sign a contract which did not contain such a provision requiring suit to be brought, but in a suit which he subsequently brought against them, they set out the provision in the original bill of lading and contended that the provisions in bills of lading issued by connecting carriers were of no legal effect. The court said:<sup>2</sup> "The final decision below was rendered two days before the decision of this court in *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213. There one of the same railroads had, as connecting carrier, issued a second bill of lading to shippers of live stock, who had received from the initial carriers a through bill of lading on an interstate shipment. But there the carriers relied for defense upon a clause in the second bill of lading, which was not contained in the first. We held that the second bill of lading was void, since under the Carmack Amendment the several carriers must be treated, not as independent contracting parties, but as one system; and that the connecting lines become in effect mere agents whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier, and that they are prevented by law from varying the terms of that contract. *Leatherwood* contends that the principle upon which the case was decided is not applicable here, because there the carriers sought to avail themselves of the second bill of lading, while here they seek to ignore it; and he insists that the carriers are, by their conduct, estopped from asserting its invalidity. As stated in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 197, 36 Sup. Ct. 541, 60 L. Ed. 948, the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them. "A different view would antagonize the

period, the measure of damages is the depreciation in market value because of the loss of tails and manes, and recovery cannot be defeated on the ground that the animals were as

capable of work as before. *Hines v. Morgan*, (Ark. 1920), 218 S. W. 672.

2. *Texas & P. Ry. Co. et. al. v. Leatherwood* (1919) 39 Sup. Ct. 518.

plain policy of the act and open the door to the very abuses at which the act was aimed." The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all effected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled. A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate and the shipper was ignorant of the fact that it was not the legal rate. *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Illinois Central Railroad Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290; *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; *Missouri, Kansas & Texas Ry. Co. of Texas v. Schnoutz*, 245 U. S. 641, 38 Sup. Ct. 221, 62 L. Ed. 527 (per curiam). The provision in the original bill of lading limiting to six months the time within which suit may be brought, not being unreasonable (*Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657, 672, 673, 33 Sup. Ct. 397, 57 L. Ed. 690), was valid; and as the original bill of lading remained binding, the lower courts erred in denying it effect. The judgment of the Court of Civil Appeals must therefore be reversed."

**Invoice Price Under Bill of Lading.** Claimant brought suit for the value of a lost shipment, based on the market value at the time of loss, whereas the carrier contended that it should be based upon invoice value of the same. The court said:<sup>3</sup> "This

3. *Wabash Ry. Co. v. Holt et. al.* (1920) 263 F. 73.

In the famous *McCaull Dinsmore* case, affirmed in the Supreme Court of the United States, the Circuit Court of Appeals said:

"Action for loss of interstate shipment of grain. The facts were stipulated. The shipment was made

under a bill of lading or shipping contract wherein it was provided that:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid."

"The contract was in a form like that included in the legally published tariffs filed with the Interstate Commerce Commission, which tariffs provided, among other things, a rate of transportation based on and controlled by said form of bill of lading, and that, in cases where the shipper was not agreeable to shipping under the terms of such form, then a higher rate was to be charged. The fair market value of the shipment at destination at the time when it should have been delivered, with interest, and less freight charges was \$1,422.22. The railway has paid thereon \$1,200.48, the value at origin at time of shipment. From a judgment for the difference the railway has taken its writ of error.

"The controversy is over the difference, and the sole question here presented is whether the origin value or the destination value should govern where the shipment was under such a form of interstate bill of lading. At the time of this shipment the so-called Cummins Amendment of March 4, 1915 (38 Stat. 1196, c. 176 [Comp. St. § 8604a]), contained the law in this respect governing form of contracts for interstate shipment. That statute provided:

"That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage,

or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the

case depends on the construction of section 20 of the 'Act to Regulate Commerce,' as changed by the so-called Carmack and Cummins Amendments. The statute as it stands respecting this litigation is section 8604a, U. S. Comp. Sta. 1916. The bill of lading in evidence, issued by the initial carrier, declares that:

Interstate Commerce Commission and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law.'

"The railway seeks to avoid the application of this provision by contending that it, in the present instance, has not sought to limit its liability, but has, on the contrary, defined liability for the full, actual loss, and has by its tariffs thus crystallized the method or arriving at the actual loss. We deem such contention unsound. There was no uncertainty as to the time or place of estimating value under the rule of common law—it was the destination. The

evident purpose of the provision in the bill of lading was not to introduce certainty, but to avoid the rule existing at law, for the obvious object of escaping a higher valuation which would often arise at destination. Such a provision is unquestionably a limitation, since it forbids application of the established rule.

"The railway also says:

"The rule, as we contend was that, *in the absence of contract*, destination value would apply, but that it was not unlawful to *agree upon origin value*.'

"Whether the parties could so agree at the common law is not material. The Cummins Amendment was not concerned alone with preventing contracts already illegal under the common law, but with prohibiting all agreements having the effect defined by that statute. Congress passed this act to remedy the defects in the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp. St. §§ 8604a, 8604aa]), as developed in the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and intended thereby to fully and finally prevent all limitations of this character. Congressional Record, 63d Congress, 3d Session, Vol. 52, pp. 5446-5451." *Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co.*, 260 Fed. 835.

'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the \* \* \* bona fide invoice price \* \* \* to the consignee,' viz. in this instance, \$467.98. This bill having been issued by the New York Central, it is admitted that under the Carmack Amendment that railroad might have been successfully sued for the damage done by its connecting carrier, the Wabash; and further it is admitted that, if so sued, it would have been liable under the Cummins Amendment for the market value of the goods lost, anything in the bill of lading to the contrary notwithstanding. But it is said that section 20 as amended puts this last new burden upon the initial carrier only, in that it specifically requires 'such carrier' (i. e., the one first receiving the goods) to answer for the miscarriage of a connecting railroad to an amount theretofore usually excluded by stipulations, such as the one above quoted. Nowhere in the amended section are the burdens of the initial carrier expressly extended to or imposed upon connecting carriers, except as the company 'issuing such \* \* \* bill of lading' is given the right to recover over from the connecting road inflicting the injury, any amount 'it (the initial carrier) may be required to pay' to the holder of the bill of lading. The result of plaintiff in error's contention is that, in suits against other than the receiving carrier for lost or injured freight, the Cummins Amendment has no effect at all; and the freight owner must perhaps cross the continent to get a full recovery, although the carrier actually inflicting the injury is at his door. It is not deniable, that a good verbal argument can be and has been made in support of this result. The amended statute is something of a patchwork, and the plain intention of Congress not well expressed in detail. Yet we feel assured that the entire section has been so read by the Supreme Court as to relieve us of much labor. The contract for carriage over the lines of connecting carriers, however numerous, is evidenced by one bill of lading, issued as in this case by the receiving carrier. That bill 'governs the entire transportation and fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid' (Georgia, etc., Co. v. Blish, etc., Co., 241 U. S. at page 195, 36 Sup. Ct. at page 543, 60 L. Ed. 948), and each participating carrier is liable according to the 'applicable valid

terms of the original bill' (Missouri, etc., Co. v. Ward, 244 U. S. at page 387, 37 Sup. Ct. at page 619, 61 L. Ed. 1213). The test of validity is to ascertain what the statute permitted the initial carrier to do in respect of making the bill of lading contract. That carrier cannot, by such a clause as was first above quoted, limit its own liability. Therefore such clause was invalid in toto; it never existed in legal effect. Thus, and thus only, can uniformity of bill of lading operation over a long line of carriers be secured, and we think this method has been insisted on in the ruling cases cited. Every bill, the moment it is signed, stands purged of all matters forbidden by the statute, including language obnoxious to the Cummins Amendment. If such clause does not in legal effect exist when the bill is signed, it does not exist at all, and the bill is to be read without it." In an action for damages to fruit during shipment, the measure of damages is the difference between the market value of the fruit in good condition at place of destination and the market value in damaged condition at such place; the price at which they were subsequently sold in small lots at another place by the one who bought them being immaterial.<sup>4</sup>

**Limitation of Liability.** The decisions of the United States Supreme Court are controlling on a state court in determining whether a carrier's liability for the loss of an interstate shipment is limited to the declared value.<sup>4\*</sup> A limitation of liability in an interstate contract of shipment to the declared value applies to a case of embezzlement by an employe of the carrier as distinguished from a conversion by the carrier itself.<sup>5</sup> A limitation of liability to the declared value in an interstate contract of shipment applies to gross, wanton, and willful negligence, making the theft or embezzlement of the shipment by an employe of the carrier easy of accomplishment and difficult of detection.<sup>6</sup> The owner of goods shipped in interstate commerce under a limited liability contract, and embezzled by the carrier's

4. Barry et. al. v. Los Angeles & S. L. R. Co. et. al. (Utah 1920), 189 P. 70.

4½. Henderson v. Wells Fargo & Co. (Tex 1919), 217 S. W. 962.

5. Henderson v. Wells Fargo & Co. (Tex. 1919), 217 S. W. 962.

6. Henderson v. Wells Fargo & Co. (Tex. 1919) 217 S. W. 962.

employee, cannot avoid the limitation of liability by proving that the shipment and assent to the limitation were without her consent, as the carrier's liability arises only from the contract.<sup>7</sup> Under the rule of the Interstate Commerce Commission and the official express classifications filed with that commission by the express companies of the United States, providing for a limitation of liability based on the declared value of the shipment, the liability for ordinary negligence is limited to the declared value, or, if no value is declared, to the sum of \$50.<sup>8</sup>

**Special Damages.** In an action against a railroad company for damages to cotton resulting from delayed delivery of nitrate of soda for fertilizer, it was hardly possible that defendant did not know the purpose of the goods, so that it was liable.<sup>9</sup> In this case the court said:<sup>10</sup> "Plaintiffs sued for damage to their cotton crop which they alleged was caused by the negligent failure of the defendants to carry and deliver to them 115 bags of nitrate of soda, which was shipped from Wilmington, N. C. It was delivered for shipment to the Atlantic Coast Line Railroad Company at Wilmington, which company issued a bill of lading marked 'To B. R. Gatlin, Woodley's Siding, N. C. (N. S. near Ellerbee),' a station in Richmond county, N. C. Its name had been changed to Plainview to prevent confusion, as there was a station on the Norfolk-Southern Railroad Company's line in Tyrrell county, N. C., called "Woodley." The soda was sent by way of Fayetteville and delivered there by the Atlantic Coast Line Railroad Company to the Norfolk-Southern Railroad Company, but the latter's agent never saw the bill of lading, and received only the waybill, on which the address was Woodley's Siding, N. C.; the words in brackets, 'N. S. near Ellerbee,' having been omitted. The agent of the Norfolk-Southern Railroad Company at Fayetteville forwarded the soda to Woodley in Tyrrell county, where it remained from June 30, 1917, until July 14, 1917,

7. *Henderson v. Wells Fargo & Co.* (Tex. 1919), 217 S. W. 962.      *ern R. Co. et. al.* (No. Car. 1920), 102 S. E. 779.

8. *Henderson v. Wells Fargo & Co.* (Tex. 1919), 217 S. W. 962.      10. *Gatlin et. al. v. Norfolk-Southern R. Co. et. al.* (No. Car. 1920), 102 S. E. 779 and 80.

9. *Gatlin et. al. v. Norfolk-South-*

on which day it was reshipped by the Norfolk-Southern Railroad Company to Woodley's Siding, where it arrived on July 17, 1917, and was delivered to the consignee on July 18, 1917. The defendant Norfolk-Southern Railroad Company contended that the negligence was that of the Atlantic Coast Line Railroad Company in not giving the true address of the consignee on its waybill or in not notifying it in some way, but his honor failed to take that view, and, holding that the Atlantic Coast Line Railroad Company was faultless, he granted a nonsuit as to that company and proceeded against the other defendant alone. There was a verdict and judgment for the plaintiff and an appeal by the defendant. First. The court committed no error in holding that there was evidence of negligence by the Norfolk-Southern Railroad Company, apart from the failure of its co-defendant to notify it of the proper address, and in this respect the case is unlike that of *Gregg v. City of Wilmington*, 155 N. C. 18, 70 S. E. 1070. There the principal wrong was done by Woolvin in piling the bricks in the streets, and though he did so with the city's permission, or license, as between the defendants, Woolvin's was the primary negligence which entitled the city to indemnity from him. In this case, the Norfolk-Southern Railroad Company committed a distinct and independent act of negligence from that of the Atlantic Coast Line Railroad Company, in that, after it received the goods for the purpose of being forwarded to their final destination, it carelessly failed to do so, when it had a sufficient address, in view of the facts, to know what station was meant, that is, "Woodley's Siding," near Ellerbe, in Richmond county, and not Woodley, N. C., which is in Tyrrell county. There was evidence on the question that, while the name of "Woodley's Siding" had been changed to Plainview, goods had been addressed to different parties at Woodley's Siding, and forwarded to and received at that place by the Norfolk-Southern Railroad Company and delivered there to the consignees. Plaintiff, B. R. Gatlin, testified that he had received shipments there constantly in 1917, addressed to him at Woodley's Siding, N. C., and that he 'had shipped there for four years and never knew it by any other name.' He lived one mile from the station. The defendant then recognized this as one of its stations by the name of 'Woodley's Siding' and actually received and shipped goods

to it by that name, although the name had been changed, which change, from the evidence, would seem not to have been put in force. At any rate, it was called by the name of Woodley's Siding, and this continued to be the case even after the change of name was made. Why the defendant should have sent the freight to Woodley, in Tyrrell county, a station far in the east, many miles away, and not having the same name, is not sufficiently or satisfactorily explained, or excused. The evidence of negligence in this respect was properly submitted to the jury. Second. Without going into details, we are of the opinion that the requests for instructions were substantially given, especially those relating to the burden of proof, the bearing and demeanour of the witnesses, and, lastly, as to the weather conditions, and not the negligence of the defendant, being the cause of the injury to the crop. The objections to the evidence are not of material importance and could not have affected the result enough for us to disturb the verdict. Third. There was some evidence as to the damages, which was not objected to, if objectionable, and which was properly submitted to the jury. It is hardly possible that defendant did not know for what purpose the nitrate of soda was being shipped, and that it was a fertilizer intended to be used on the plaintiff's lands to aid in its better cultivation. The case is governed in this respect by *Neal v. Hardware Co.*, 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697; *Herring v. Armwood*, 130 N. C. 177, 41 S. E. 96, 57 L. R. A. 958; *Lumber Co. v. Railroad Co.*, 151 N. C. 217, 65 S. E. 920; *Pendergraph v. Express Co.*, 178 N. C. 344, 100 S. E. 525. See, also, *Tomlinson v. Morgan*, 166 N. C. 557, 82 S. E. 953; *Guano Co. v. Live-Stock Co.*, 168 N. C. 451, 84 S. E. 774, L. R. A. 1915D, 875; *Carter v. McGill*, 168 N. C. 507, 84 S. E. 802; *Ibid.* 171 N. C. 775, 89 S. E. 28. The verdict was a full one, and may have been too large, as contended by defendant; but a motion was made in the superior court to set it aside as being against the weight of the evidence, which was denied, and we presume the judge was also asked to set it aside because the damages were excessive. His decision on these motions is not reviewable in this court. No error."

**Interest on Claims.** The consignee of seed potatoes suing seller and carrier for damage through delay in delivery held en-

titled to judgment against the seller for \$500, with interest, as found by the jury on undisputed evidence that the seller did not obey the consignee's instructions as to the route of shipment.<sup>11</sup>

11. *Hudgins Produce Co. v. Missouri Pac. H. Co.* (Ark. 1919), 215 S. W. 606.

## CHAPTER IX.

### ACTIONS AT LAW FOR DAMAGES.

**Jurisdiction of Courts.** When a court has no jurisdiction of the subject-matter, it cannot be conferred either by waiver or consent, and all of its orders and decrees are a nullity, and may be collaterally attacked.<sup>1</sup> A justice court can not consolidate 648 actions on claims against the defendant railroad company for overcharges on freight shipments, under the state constitution, relating to long and short hauls, which claims had been assigned to plaintiff, and try them together.<sup>2</sup> Carrier corporations, during the period of federal control, remain legal entities capable of suing and being sued in the courts, and are champions of their own legal rights.<sup>3</sup> Under the Federal Rail Control Act, the Di-

1. *Petition of Southern Lumber & Mfg. Co.*, 210 S. W. 630.

The statutes of a state have no effect beyond its own limits. *Western Union Telegraph Co. v. Epley* (Tex. 1920), 218 S. W. 528.

In an action for failure to deliver wheat sold, evidence of usage and custom was properly considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the f. o. b. steamship clauses of the contracts. *Meyer v. Sullivan* (Cal. 1919), 181 Pac. 847.

2. *Atchison, T. & S. F. Ry. Co. v. Smith* (Calif. 1919), 183 Pac. 824.

A justice of the peace has no power to amend a summons; the powers given to courts by Code Civ. Proc. § 723, applying to courts of record, the justice having no other powers in that connection, except such as are

given by section 2994 relating to pleadings only. *Gifford v. Fargo*, 176 N. Y. S. 568.

3. *McGregor v. Great Northern Ry. Co.* (N. Dak. 1919), 172 N. W. 841.

The word "carriers" as used in Act March 21, 1918, \*10 (U. S. Comp. St. 1918, \*3115¼j), providing that actions may be brought against carriers under federal control, means the corporations, and not the Director General. *McGregor v. Great Northern Ry. Co.* (N. Dak. 1919), 172 N. W. 841, 842.

Section 10 of the Rail Control Act (U. S. Comp. St. 1918, § 3115¼j) is construed and held to authorize the bringing of actions against the carrier corporations during the period of federal control. *McGregor v. Great Northern Ry. Co.* (N. Dak. 1919), 172 N. W. 841.

rector General is charged with administering the transportation systems owned by the various carrier corporations, but he is not authorized to appear and defend suits brought against them.<sup>4</sup> General Order No. 50, promulgated by the Director General of Railroads, which requires that suits upon causes of action arising subsequent to December 31, 1917, shall be brought against the Director General of Railroads and not otherwise, and which authorizes the substitution of the Director General for the carrier company as party defendant and the dismissal of the action as to the company, is not warranted by the Rail Control Act of March 21, 1918, in so far as it purports to be applicable to causes of action already vested.<sup>5</sup>

### Statute of Limitations.<sup>6</sup>

**Parties.<sup>7</sup>** While the transferee of an "order notify" bill of lading, after paying the draft attached and obtaining possession

4. *McGregor v. Great Northern Ry. Co.* (N. Dak. 1919), 172 N. W. 841.

5. *McGregor v. Great Northern Ry. Co.* (N. Dak. 1919), 172 N. W. 841.

6. A provision in a through bill of lading issued for the interstate shipment of live stock, barring any action for damages unless suit should be brought within six months after loss occurred, is reasonable and should be enforced. (Case arose prior to Cummins Act.) *T. & P. Ry. v. Leatherwood*, 39 Sup. Ct. 517.

7. Though it developed in plaintiff's testimony that he had a partner, M., in the business, for injury to property of which he sued individually, there was no prejudice in not dismissing the action, which defendant asked, or in not making M. a party, which defendant did not ask; M.'s presence at the trial and testimony establishing the right of recovery con-

stituting an approval of the form of action and estopping him to dispute plaintiff's right to maintain it, preventing defendant being subjected to another action for the injury. *Missouri Pac. R. Co. v. Block* (Ark. 1920), 218 S. W. 682.

There being no evidence to the contrary, there is a presumption that title to coal vested in a consignee. *Cleveland C. C. & St. L. Ry. Co.* (Ind. 1919), 123 N. E. 838.

Generally, if the agreement is to sell goods "f. o. b." at a designated place, such place will ordinarily be regarded as the place of delivery, but the effect of the "f. o. b." depends on the connection in which it is used, and, if used in connection with words fixing price only, it will not be construed in fixing place of delivery. *Meyer v. Sullivan* (Cal. 1919), 181 Pac. 847.

A partnership between father and son is dissolved by death of father and the purchase by the son of the

of the bill of lading, and thus acquiring the legal title to the goods mentioned therein, may maintain a suit against the carrier for any shortage in the shipment occasioned subsequently to the transfer of title and before delivery to him, where such shortage is traced to the carrier, yet where, in such a suit, the bill of lading does not appear in evidence, and there is no evidence of any admission upon the part of the carrier as to the amount of goods received by it from the consignor, or other evidence tending to prove the amount of goods in the possession of the carrier and delivered to the transferee, the latter, although proving title to the goods shipped and received, fails to prove any loss or damage to the shipment accruing after he had obtained title thereto.<sup>8</sup>

**Pleading and Practice.**<sup>9</sup> Under the Carmack Amendment a bill of lading on an interstate shipment of live stock issued by the initial carrier is binding on the shipper and all connecting

father's interest from his heirs. *Winget v. Grand Trunk Western Ry. Co.* (Mich. 1920), 177 N. W. 273.

The failure of one doing business under an assumed name to file the certificate required by Pub. Acts 1907, No. 101, does not affect the right to sue *ex delictu*. *Winget v. Grand Trunk Western Ry. Co.* (Mich. 1920), 177 N. W. 273.

8. *So. Ry. v. Hunt* (Ga. 1920), 102 S. E. 757.

9. In order that plaintiff may enforce his right to judgment on the pleadings, he must stand on them, and he waives that right if, after an ineffectual motion for judgment owing to the absence of an answer, he goes to trial on complaint, offers evidence to the jury, and is defeated. *Jackson v. Mauck* (Ind. 1920), 126 N. E. 851.

The New York Code of Civil Procedure providing that, in action against a corporation, plaintiff at the

trial need not prove its existence unless a verified answer affirmatively alleges that defendant is not a corporation, applies to a "joint-stock association," which is not a "corporation," though having most of the attributes of a corporation. *Gifford v. Fargo*, 176 N. Y. S. 568.

Motions to strike portions of a return to an alternative writ of mandamus will be denied when the averments sought to be stricken are not wholly irrelevant or improper. *State v. Atlantic Coast Line R. Co.*, (Fla. 1919), 81 So. 498.

Where summons in a justice court was amended by consent as to the name of the defendant, and an answer was filed in that name, the defendant, on appeal from an adverse judgment, was estopped to complain that the amendment was without warrant, even where summons as first issued was not effective. *Gifford v. Fargo*, 176 N. Y. S. 568.

carriers, just as the rate properly filed by the initial carrier is binding on them; so connecting carriers, though they insisted as a condition of carrying the shipment further that the shipper accept and sign a new bill of lading, may rely on a provision in the original bill of lading limiting the time for action, though the bills they issued contained no such limitation.<sup>10</sup> A plaintiff is entitled to an affirmative presentation of a material issue raised by the pleadings and the evidence.<sup>11</sup> A demurrer to answer admits an averment that for valuable consideration plaintiffs released and waived the cause of action sued on.<sup>12</sup> In an action against a railroad for breach of an inseparable contract for the shipment of cattle and the furnishing of cars therefor, the cause alleged was not supported by evidence showing a contract made verbally over the telephone for the furnishing of cars, and a shipment contract in writing.<sup>13</sup> In suit by a carrier to recover the value of a carload of mules delivered to defendants by mistake instead of another shipment intended for them but delivered to a third party, a cross-bill in equity based on freight paid, expenses of feeding and handling, and damages to the second ship-

Where two railway companies filed a joint answer, not complaining of misjoinder of causes of action, and subsequently filed separate answers, pleading misjoinder in abatement, the objection was waived. (*State shipment.*) *Missouri, K. & T. Ry. Co. v. Baker Bros.* (Tex. 1919), 210 S. W. 244.

Where the defendant's motion for continuance for absent witnesses was excepted to on ground that there is no pleading on which to predicate the testimony, that testimony was not material, and that no diligence was shown, and court overruled motion without showing basis of his ruling in his order, court's ruling is available as error, on appeal, notwithstanding inadmissibility of testimony under general denial, since it will be assumed that defendant would have

amended pleaded if motion had been overruled on such ground. (*State shipment.*) *Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

To have entitled a railroad company to relief, against its contract to transport a carload of corn, on the ground of mistake, the road must have set up such mistake in its pleadings. *Chicago & G. W. Ry. Co. v. Plano Milling Co.* (Tex. 1919), 214 S. W. 833.

10. *T. & P. Ry. v. Leatherwood*, 39 Sup. Ct. 517.

11. *Mistrot-Calahan Co. v. Missouri K. & T. Ry. Co. of Texas*, 209 S. W. 775.

12. *Coleman v. Hines*, (Mo. 1920), 217 S. W. 602.

13. *Thee v. Wabash Ry. Co.*, (Mo. 1920), 217 S. W. 566.

ment, could be maintained; the two demands growing out of one transaction and being vitally related, so that the issues presented by the cross-bill were germane to the issues made by the original bill, particularly in view of the fact that if defendants could not maintain their cross-bill they would be forced to go to a foreign jurisdiction to prosecute their cross-action.<sup>14</sup> In action against express company for conversion of trunk, express company's answer admitting delivery to it of trunk consigned to plaintiffs, and cross-complaint alleging the receipt of trunk from initial express company, "being the trunk referred to in plaintiff's complaint," did not admit plaintiff's allegations as to contents of trunk and their value, having reference merely to the trunk itself.<sup>15</sup> In an action against several defendants, the term of court at which some of the defendants were required to answer, previous to which a deposition was filed, was the first term after such deposition had been filed, within the provisions of Rev. St. 1911, art. 3676, and such defendants were required to make their motion to suppress the depositions at such term of court, and could not wait until a later term of court, at which the other defendants were required to answer.<sup>16</sup> A party cannot complain of a charge submitting the issue of negligence to the jury, where he invited the error by pleading negligence, offering proof thereon, and impliedly assenting to the charge by failing to object to it.<sup>17</sup> As against a general demurrer, every reasonable intendment must be indulged in favor of a petition.<sup>18</sup> The rule that all parts

14. *Schaff v. Kahn & Bernstein*, (Miss. 1920), 83 So. 622.

15. *Johnson v. Western Express Co.* (Wash. 1919), 181 Pac. 693.

16. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.*, (Tex. 1919), 215 S. W. 866.

17. *Nabors v. Colorado & S. Ry. Co.*, (Tex. 1919), 210 S. W. 276.

18. *Western Union Tel. Co. v. Mobley* (Tex. 1920), 220 S. W. 611.

On a demurrer to a return or answer in mandamus the law applicable to the facts duly stated and

admitted is to be determined by the court; and the essential question, when properly presented, is whether the facts thus alleged and admitted are in law sufficient as a defense to the writ. *State v. Atlantic Coast Line R. Co.*, (Fla. 1919), 81 So. 498.

The functions of a demurrer to a return to an alternative writ of mandamus is to raise a question of law as to the right of the relator on the pleadings to the relief sought. All the allegations of fact that are, as a matter of pleading, sufficiently averred in the return, are for the

of a pleading will be considered to give effect to intention of pleador is not applicable against a special exception.<sup>19</sup>

**Burden of Proof.**<sup>20</sup> In an action against carrier for injuries to mules in transit, plaintiffs were not required to prove negli-

purpose of the demurrer admitted to be true as averred. *State v. Atlantic Coast Line R. Co.* (Fla. 1919), 81 So. 498.

19. *Western Union Tel. Co. v. Kilgore* (Tex. 1920), 220 S. W. 593.

20. In an action against a railroad for death of a stallion caused by failure to transport as expeditiously as required by a Kansas statute, slight evidence is sufficient to maintain the shipper's burden of proof as to the cause of death to make a case for the jury. (State shipment.) *Strother v. Atchison, T. & S. F. Ry. Co.* 212 S. W. 404.

In an action against initial carrier for negligent delay in delivery of live stock shipment, where petition did not allege negligence by connecting carrier, but predicated liability on negligence of initial carrier alone, plaintiff could not recover upon proof of connecting carrier's negligence, notwithstanding *Vernon's Salyes'* Ann. Civ. St. 1914, arts. 731, 732. (State shipment.) *Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

The Texas law, providing that any connecting carrier of a through shipment may be held liable for negligence of any other connecting line, does not relieve party suing of the burden of alleging and proving the negligence of such other connecting line upon which the cause of action is based. State shipment. *Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

In *Baker v. Schaff*. (Mo. 1919), 211 S. W. 103, the court said, p. 104:

"It is held that a question of burden of proof is matter of substance, and therefore not subject to control by the laws of the states. *New Orleans R. R. Co. v. Harris*, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167; *Charleston & Car. Co. v. Varnville Co.*, 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. 1137, Ann. Cas. 1916D, 333; and *Southern Ry. v. Prescott*, 240 U. S. 632, 639, 36 Sup. Ct. 469, 60 L. Ed. 836."

In determining whether defendant's demurrer to evidence should have been sustained, the court can consider only evidence which can be regarded as properly bearing on the issue raised by the petition. *Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

In action against carrier of stallion for failure to transport as expeditiously as required by statute after accepting for transportation, inquiry must be confined to ascertaining whether there was a failure to obey the statute after acceptance of the shipment, and the court can consider only evidence in relation to the movement of the shipment from and after it was accepted. *Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

The Public Service Commission Act, § 40, providing that every common carrier, railroad corporation, or street railroad corporation shall be liable for damage to property by de-

gence to the satisfaction of the jury, but only by a preponderance of the evidence.<sup>21</sup> In a shipper's action for damage to live stock shipment from negligent delay, where carrier's contractual and common-law liability was pleaded and shipper made all proof necessary to sustain case on theory carrier was liable as insurer, and carrier was not prevented from introducing evidence to exempt itself from such liability, it cannot resist liability on that theory.<sup>22</sup> Only when all circumstances taken together unavoidably point to and afford but one reasonable explanation may the evidence be considered as conclusively raising an inference of

lay in transit due to negligence, but the burden of proof shall be on the carrier to show the delay was not due to negligence, held not violative of Const. art. 4, § 28, specifying certain requirements for the titles of statutes *Cunningham v. Chicago & A. R. Co.* (Mo. 1919) 215 S. W. 5. (State shipment.)

Public Service Commission Act, § 40, providing that every common carrier, railroad corporation, or street railroad corporation shall be liable for damage to property by delay in transit due to negligence, but the burden of proof shall be on the carrier to show the delay was not due to its negligence, held not, by changing the burden of proof and imposing it on a railroad corporation on the proof of mere delay in transit, to take its property without due process of law, contrary to federal Const. Amend. 14, or Const. Mo. art. 2, § 30, in that proof of mere delay does not reasonably imply or infer negligence. *Cunningham v. Chicago & A. R. Co.* (Mo. 1919), 215 S. W. 5. (State shipment.)

Public Service Commission Act. § 40, changed the rule as to the burden of proof in actions against carriers for damages from delay in transport-

ing a shipment by providing that on proof by the shipper of the delay, and that damage or loss was caused thereby, the burden should shift to the carrier to show the delay was not due to its negligence. *Cunningham v. Chicago & A. R. Co.* (Mo. 1919), 215 S. W. 5. (State shipment.)

Public Service Commission Act, § 40, providing that every common carrier, railroad corporation, or street railroad corporation shall be liable for damage to property by delay in transit due to negligence, but the burden of proof shall be on the carrier to show the delay was not due to negligence, held not unconstitutional, as omitting from the operation of the act express companies, boat lines, receivers, and individuals operating transportation systems, therefore denying to railroad companies the equal protection of the laws, particularly in view of section 2, par. 9. *Cunningham v. Chicago & A. R. Co.* (Mo. 1919), 215 S. W. 5. (State shipment.)

21. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.*, 210 S. W. 853.

22. *Missouri Pac. R. Co. v. Martindale* (Ark. 1919), 213 S. W. 777.

the fact sought to be established.<sup>23</sup> Where no one accompanies shipment of live stock, and injury results in transit, the shipper makes out a *prima facie* case when he shows the animals were in good condition when delivered to the carrier, and damaged when delivered to consignee, casting the burden on the carrier to show the cars were in good condition and suitable, handled with reasonable dispatch, and not roughly or improperly treated, also the burden to explain the cause of injury.<sup>24</sup> In an action against an express company for the value of two packages, delivered to it for shipment to a named consignee, where plaintiff testified that on two different dates in the same month he delivered to the company two packages containing a quantity of watches, addressed to the consignee at hotels in Lexington, Ky., and Birmingham, Ala., which packages were not received by the consignee, dismissal of the complaint as for failure of proof was improper, and judgment for defendant company thereon cannot stand.<sup>25</sup> A sculptor properly packed and shipped a plaster

23. *Louisville & N. R. Co. v. Hunter* (Ky. 1919), 214 S. W. 914.

24. *Louisville & N. R. Co. v. Hunter* (Ky. 1919), 214 S. W. 914.

In *Louisville & N. R. Co. v. Hunter* (Ky. 1919), 214 S. W. 914, the court said:

"Where no one accompanies the stock and injury results in transit, the rule in this state is that the shipper makes out a *prima facie* case when he shows that the animals were in good condition when delivered to the carrier, and in a damaged or injured condition when delivered by the carrier to the consignee, thereupon the burden is cast upon the carrier to show that the cars in which the stock was shipped were in good condition and suitable for that purpose, were handled with reasonable dispatch, and were not subjected to any rough or improper treatment during the jour-

ney, and the carrier in addition must explain the cause of the injury to the stock, and it can only exempt itself from liability by showing that the injury or death was brought about by the act of God or the public enemy or because of the inherent nature, propensities, or viciousness of the animals themselves, or to the act or fault of the shipper. *L. & N. R. Co. v. Pedigo*, 129 Ky. 661, 113 S. W. 116; *I. C. Ry. Co. v. Word*, 149 Ky. 229, 148 S. W. 949; *McC Campbell, etc., v. L. & N. R. R. Co.*, 150 Ky. 723, 150 S. W. 987; *L. & N. R. R. Co. v. Cecil*, 155 Ky. 170, 159 S. W. 689; *C. N. O. & T. P. Ry. Co. v. Smith, etc.*, 155 Ky. 481, 159 S. W. 987; *C. N. O. & T. P. Ry. Co. v. Veatch*, 162 Ky. 136, 172 S. W. 89; *L. & N. R. R. Co. v. Taylor*, 181 Ky. 794, 205 S. W. 934."

25. *Schiff v. Am. Ry. Express Co.*, 180 N. Y. 480.

bust to a bronze foundry for casting. Upon arrival the bust was found broken. The box was in good condition and was marked as containing a fragile article. Held, that the verdict of the jury holding the carrier liable was justified by the evidence.<sup>26</sup> In an action by a shipper of cattle for damages caused by delay in transit, the burden was upon the carrier, where delay was caused by unsuccessful attempts to make a coupling with a snow-plow, to show that the delay was unavoidable.<sup>27</sup> Sheep shipped over the line of defendant carrier having arrived at destination in good condition, and having been in good condition when unloaded, the burden of proof, on the charge that there was unreasonable delay in putting the cars in position for unloading, so that the sheep were unloaded too late in the day and were chilled, was on plaintiff shipper.<sup>28</sup> In an action for injuries to a shipment of cattle, the burden is upon the carriers to sustain the defense of contributory negligence by a preponderance of the evidence.<sup>29</sup> In an action for injuries to a shipment of cattle while in transit, the burden is upon plaintiffs to show that they were negligently handled en route, where one representing plaintiffs accompanied the cattle throughout the entire trip.<sup>30</sup> While one, suing a bailee for hire for the value of goods, makes out a prima facie case by proof of demand and failure to deliver, the defendant, by proving that the goods were lost by fire or theft, rebuts the plaintiff's prima facie case, and plaintiff must assume the burden of presenting further evidence of negligence.<sup>31</sup>

**Competency of Witnesses.**<sup>32</sup> Opinion testimony of qualified witnesses on questions of fact is admissible, but opinions par-

26. *Noble v. American Express Co.* (Mass. 1920), 125 N. E. 598.

27. *Gilbreath v. Atchison, T. & S. F. R. R.* (Mo. 1920) 217 S. W. 636.

28. *Smart v. Oregon Short Line R. Co.* (Utah 1919), 183 Pac. 320. (State case.)

29. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Tex. 1919), 214 S. W. 721.

30. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Tex. 1919), 214 S. W. 721.

31. *Stevenson & Co. v. Hartman*, 181 N. Y. S. 465.

32. Testimony by a witness with long experience in the oil business regarding the value of certain oil testing a specified figure held competent and admissible. *Coad v. Pennsylvania Ry. Co.* (Ia., 1919), 175 N. W. 344.

In an action for damage to live stock shipment, testimony of witnesses who were shown to have had experience in shipping cattle as to effect on cattle of long distance transportation held admissible. *Panhandle & S. F. Ry. Co. v. Sanderson* (Tex., 1920), 218 S. W. 540.

Where cattle have not been weighed either when shipped or when delivered, a witness who sees them only when delivered is in no position to testify that they have lost any specific weight in their transit, and his opinion that they look more drawn than they should is not sufficiently definite, either as to the cause or the extent of the loss of weight, to authorize a judgment for damages to be computed on that basis. *Neely v. T. & P. Ry.* (La., 1919), 82 So. 745.

In *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex., 1919), 215 S. W. 866, the court said, p. 868: "Under the fourteenth assignment it is contended that the testimony of the witness Taylor, as to the market value at Kansas City of certain of the cattle, was not admissible because the witness was not qualified to testify as to the market on the particular days referred to. It appears from the examination of the witness that his knowledge of the market at the time mentioned was based on weekly statements or market reports sent him by commission companies in Kansas City. We infer, though the record does not make the matter very clear, that these reports were the commission companies' own statements and conclusions as to the market dur-

ing the week, and were perhaps issued in the form of a circular letter. The authorities are not in accord as to the admissibility of the opinion of a witness thus qualified. *T. & P. Ry. Co. v. Slator*, 102 S. W. 156; contra, *Texas Central Ry. Co. v. Fisher*, 18 Tex. Civ. App. 78, 43 S. W. 584. See, also, *T. & P. Ry. Co. v. Donovan*, 86 Tex. 378, 25 S. W. 10; *I. & G. N. Ry. Co. v. Dimmitt County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. 755; *Houston Packing Co. v. Griffith*, 164 S. W. 431; *Enc. of Evidence*, vol. 13, p. 563. In view of the conflict in the holdings, we suggest that it would be the safer policy upon another trial to reject the evidence unless the witness shows further qualification, though we do not undertake to say what our own holding would be if this were the only question presented on appeal. There is evidence as to what the weight of the cattle should have been on the market had they been transported in the usual time, and there is also evidence as to what the cattle actually weighed when they were sold, so that we do not think there is any merit in the sixteenth assignment, which complains of the charge because it submits an element of damage on account of shrinkage in weight of the cattle; nor do we think that the charge, taken as a whole, could be understood by the jury as warranting a recovery for the natural shrinkage in transit."

Testimony by witness who had long experience in the oil business that he 'knew the gravity test of certain oil and that it tested a cer-

taking of the nature both of fact and law are not admissible, and admission or exclusion of such opinions is for the trial court in the exercise of discretion, not reviewable unless abused.<sup>33</sup> In an action for delay in shipping cattle, the shipper, a man of large experience, who did not accompany the train, but observed the crew, was properly permitted to testify to delay in getting started from loading point, and that experience had taught him that the movement of the crew was one indication of the chance a shipper would have in making timely arrival at the market.<sup>34</sup> The mere fact that a witness made out a bill of lading does not qualify him to testify that it is customary to send each shipment to its destination, and that a particular shipment was sent to the destination described in the bill of lading.<sup>35</sup> A witness without personal knowledge is not competent to testify because he refreshes himself by consulting some book or record having no statement on the matter regarding which he is attempting to testify.<sup>36</sup> Testimony of a caretaker accompanying a shipment of cattle that at one station the train was cut in two, and one part was switched out of his sight, held insufficient to warrant submission of the carrier's negligence in handling the train, such caretaker also having testified that when the train is in motion the cattle will stand and ride, and when not in motion will fight, lie down, and be trampled upon.<sup>37</sup> In an action against a railroad for damage to castrated bulls through delay in transit, plaintiff's testimony, showing the difference in the weight of the cattle at shipping point and their weight when unloaded at destination, held not improperly received, as not taking into consideration the fact that the cattle were castrated just before being shipped.<sup>38</sup> In an action for the value of burnt cotton, which

tain figure held admissible. *Coad v. Pennsylvania Ry. Co.* (Ia., 1919), 175 N. W. 344.

33. *Panhandle & S. F. Ry. Co. v. Sanderson* (Tex., 1920), 218 S. W. 540.

34. *Gilbreath & Atchison, T. & S. F. R. R.* (Mo., 1920), 217 S. W. 636.

35. *Coad v. Pennsylvania Ry. Co.* (Ia., 1919), 175 N. W. 344.

36. *Coad v. Pennsylvania Ry. Co.* (Ia., 1919), 175 N. W. 344.

37. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Tex., 1919), 214 S. W. 721.

38. *Cunningham v. Chicago & A. R. Co.* (Mo., 1919), 215 S. W. 5 (state shipment).

was destroyed while in transit after it had been salvaged, testimony by witness of large experience in buying and selling burnt cotton as to its value, based on the market value of merchantable cotton, held competent and sufficient to support a verdict for damages, though the witness did not state the cost of reconditioning the cotton, on which his estimate of value had been based; that being matter for cross-examination.<sup>39</sup> In action for the value of burnt cotton, which was destroyed in transit after it had been salvaged, refusal to permit cross-examination of plaintiff as to the amount paid for the cotton, which the carrier desired to introduce on the question of value, held harmless; there being no showing of the expense of handling, salvaging, repicking the cotton, etc.<sup>40</sup> One who did not personally weigh cattle could nevertheless testify as to the correctness of a copy of account sales, if he was present when the cattle were weighed.<sup>41</sup> In action for damages to stock of goods from fire, evidence as to value of salvage by witness, who stated the sum appearing in reports from factory to which goods had been shipped, without personal knowledge of either the actual value of the salvage or amount actually paid therefor, was incompetent and hearsay.<sup>42</sup> Expert witnesses who had had experience in the shipping and handling of live stock, particularly hogs, and who were present when car of hogs in question was opened at destination, were competent to state their opinion as to whether the car had been properly sprinklered and wet down during transit.<sup>43</sup> In an action against a carrier for damages to a shipment of cattle resulting from rough handling in spotting cars, the testimony of witness that they were not spotted in the usual and customary manner was competent, where the witness testified that he had about 30 years' experience in raising, buying, selling, and shipping cattle, and had on numerous occasions observed shipments

39. *Southern Ry. Co. v. Pettit*, 1919, 215 S. W. 866.  
257 Fed. 663.

40. *Southern Ry. Co. v. Pettit*,  
257 Fed. 663.

41. *Panhandle & S. F. Ry. Co.*  
*v. Clarendon Grain Co. (Tex.,*

42. *International Harvester Co.*  
*v. Chicago, M. & St. P. Ry. Co.*  
(Ia., 1919), 172 N. W. 471, 473.

43. *Lerum v. Chicago, M. & St.*  
*P. Ry. Co. (N. Dak., 1919)*, 172 N.  
W. 878.

of cattle to the point in question as well as other points.<sup>44</sup> In an action against a carrier for damages to shipment of live stock, a witness' testimony that he asked conductor to see if he could get the engineer to handle the cars with more care and was told that anything the train crew said to the engineer seemed to make matters worse instead of better was admissible as part of the *res gestæ*.<sup>45</sup> In an action against a carrier for damages to shipment of cattle, the testimony of a witness that he asked the conductor to see if it was possible to get the engineer to spot the cars with more care to save loss to owners was admissible.<sup>46</sup> In an action against a railroad for the destruction by fire of cotton in transit, a member of plaintiff firm, long experienced in handling, buying, and selling cotton, held qualified to give an opinion as to quality of the cotton.<sup>47</sup>

**Admissibility of Evidence.**<sup>48</sup> In a shipper's action for damage to live stock, testimony as to contents of the official Railway Equipment Register was not admissible to prove capacity of

44. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Tex., 1919), 211 S. W. 255.

45. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Tex., 1919), 211 S. W. 255.

46. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Tex., 1919), 211 S. W. 255.

47. *Sugarland Ry. Co. v. Dew Bros.* (Tex., 1919), 212 S. W. 190.

48. In an action against an express company for damage to a shipment of horses, testimony of plaintiff that when he arrived on the train with the horses at a point in Iowa he was informed by a stranger, who told him he was agent of the express company in charge of another car, that he could not ride to Chicago on the train with the horses, etc., held admissible without a plea of confession

and avoidance to show plaintiff did not accompany the stock, and to impart notice to defendant express company of the fact, also to repel the allegation that plaintiff was negligent in failing to exercise his contract privilege to travel with the shipment. *Gibson v. Adams Express Co.*, (Ia., 1919), 175 N. W. 331.

In an action for injury to a shipment of horses and mules, testimony of some of the witnesses at destination expressing their opinion as to the cause of the damage to the stock, though improperly received, held not prejudicial. *Louisville & N. R. Co. v. Hunter* (Ky., 1919), 214 S. W. 914.

Admission in duplicate bills of lading and shipping receipts with evidence regarding calculations and measurements made at destination held to make a jury question whether defendant carrier charged freight on

a greater weight of gasoline than it delivered to the consignee. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

In *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344, the court said, p. 346:

"The plaintiff, as he was required to do, filed his claim. He filed it with the delivering carrier, and seems to have attached the original bills of lading or waybills to the claim, which it was perfectly proper to do. He was not permitted to introduce duplicate freight bills, bills of lading, or waybills, and the like, and thereby to show the number of gallons that had been delivered to the initial carrier. He made demand for the originals, and the defendants did not produce them. The excuse has been stated. We think the duplicates offered should have been received. See *Simons v. Petersberger*, 171 Iowa, 564, 151 N. W. 392; *Cochburn v. Assn.* 163 Iowa, 28, 143 N. W. 1006; *Fremont v. Railway*, 180 Mich. 283, 146 N. W. 678. And the testimony of Von Tacky that a bill of lading was made was a link that should not have been stricken."

In *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344, the court said, p. 348:

"Admissions made by the agents of the carrier, or agreements in shipping contracts, may work an admission on part of the carrier. *Lincoln v. Railway*, 86 Neb. 338, 125 N. W. 603; *Prew v. Railway*, 37 S. D. 72, 156 N. W. 582. And bills of lading and way bills may work admissions as to what articles were delivered to the carrier for shipment. *Railway v. Johnston*, 58 Neb. 236, 78 N. W.

499. We think that the documents which plaintiff had filed with his claim and which the carrier has failed to return to him send to the jury the first part of the equation, to wit: How much gasoline was delivered to the carrier? Of course, that does not prove a shortage. It is necessary to have some evidence in addition to evidence of how much was delivered to the carrier. It is necessary to have some evidence as to how much the carrier delivered to the consignee. And we think there was enough evidence on that head to send shortage to the jury.

"The plaintiff testified without objection that he scraped off the manhole and measured the shortage; that he used a 3-foot rule used for showing the number of inches of shortage and a scale giving the number of gallons; that on this measurement he found a shortage of 289 gallons. Later he repeated that they took off the manhole to unload; that he then saw the gasoline was short, measured it, and found it was 11 inches short. He said this without objection. But, after it was said, defendant had stricken out merely the words 'I saw it was short.' Up to this point there was no objection to this positive and definite evidence, both on the existence and the amount of the shortage."

In an action against an express company by the consignee of a shipment of horses for loss and depreciation, a conversation between the shipper and the express company's agent relating to whether it was safe to make the shipment held not inadmissible, as varying the terms of the contract, serving merely to explain the climatic conditions when performance was begun. *Clapp v.*

American Express Co. (Mass. 1919), 125 N. E. 163.

In an action against an express company by the consignee for loss and depreciation of a shipment of horses, hypothetical question to the consignee's veterinarian held subject to exclusion, as assuming facts on which liability might be predicated when the company by the terms of its contract was exonerated from such responsibility. *Clapp v. American Express Co.* (Mass. 1919), 125 N. E. 163.

In an action against a railroad for damage to a shipment of sheep through delay, the deposition of the salesman who sold the sheep, as to their weight and the price for which they were sold, held admissible. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208.

In an action against initial carrier for negligent delay in delivery of live stock shipment, where there was no allegation of negligence by connecting carrier, evidence tending to show that connecting carrier's failure to deliver shipment sooner was due to congestion of traffic, and not negligence on part of such carrier, was material to show delay by initial carrier, if any, was no proximate cause of loss, and to controvert plaintiff's contention of negligent delay by connecting carrier after receiving shipment from initial carrier. *Ft. Worth & R. G. Ry. Co. v.*

If a railroad killed 4 and injured shipper's right of action how many handling, it was immaterial to the 3 head of stock en route by rough Jones (Tex. 1919), 212 S. W. 552. head the consignee accounted for. (State shipment.)

*Missouri Pac. R. Co. v. Bradley* (Ark. 1919), 215 S. W. 668.

When a carrier requests that cotton be inspected and inspection certificate issued before cotton is shipped, and where the inspector is permitted to seal cars when inspected by him, held, that the facts stated are sufficient to sustain a finding that the inspector is an employee of the carrier. *St. Louis & S. F. R. Co. v. Blocker* (Okla. 1919), 184 Pac. 584.

In action for injuries by fire from a locomotive evidence of other fires prior to the day of the fire in issue is, as a general rule, inadmissible. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 473.

Admission of testimony as to telephone conversation, by witness to whom conversation had been related by one of the parties thereto, was not prejudicial to plaintiff, where only fact testified to by such witness, not testified to by the party who had related conversation to him, was a fact alleged by petition, and as to that fact party stated he could not remember. *Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552. (State shipment.)

In action for delay in delivery of cattle shipment, testimony predicated upon correctness of records of sales of the cattle kept by person making sales and records of weight by person doing weighing was not objectionable as hearsay. (State shipment.) *Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

The rejection of merely cumulative evidence is not error. *Jackson v. Mauck* (Ind. 1920), 126 N. E. 801.

Erroneous ruling by the court as to the admission or exclusion of testi-

cars, over objection that it was not best evidence.<sup>49</sup> In an action against the carrier of horses by the consignee for damages for loss and depreciation, weather and war having seriously interfered with traffic, certified copy of an order of the United States Fuel Administration, issued after the date of the contract for transportation, and after performance had been begun, held irrelevant.<sup>50</sup> In an action against an express company by the consignee for loss and depreciation of a shipment of horses, a conversation between the shipper and the company's agent at Chicago to the effect that the agent had promised to get the horses out of Chicago on a certain train held admissible as an act of the company in connection with the transportation.<sup>51</sup> Where a claimant filed a claim for a shortage, and to his claim attached the original bills of lading and freight bills, and upon the trial the carrier is not able to produce such bills of lading, it is then admissible for the claimant to introduce as evidence duplicate freight bills and bills of lading.<sup>52</sup> Admission made by a carrier's agent or agreements in shipping contracts may constitute an admission on the carrier's part.<sup>53</sup> A copy of account sales was not objectionable as hearsay, where witness testified from his own knowledge that the copy was correct.<sup>54</sup> In action against a carrier for damages from delay in shipment of cattle, court properly submitted shrinkage in weight of cattle as an element of damage, where there was evidence as to what the weight of the cattle should have been on the market had they been transported at the usual time, and as to what the cattle actually weighed when they were sold on the market.<sup>55</sup> An unloading

mony which did not jeopardize the substantial rights of appellants do not require reversal, under Comp. Laws 1917, § 6968. *Barry et. al. v. Los Angeles & S. L. R. Co. et. al.* (Utah 1920), 189, p. 71.

49. *Panhandle & S. F. Ry. Co. v. Sanderson* (Tex., 1920), 218 S. W. 540.

50. *Clapp v. American Express Co.* (Mass., 1919), 125 N. E. 163.

51. *Clapp v. American Express*

*Co.* (Mass., 1919), 125 N. E. 163.

52. *Coad v. Pennsylvania Ry. Co.* (Ia., 1919), 175 N. W. 344, 346.

53. *Coad v. Pennsylvania Ry. Co.* (Ia., 1919), 175 N. W. 344.

54. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex., 1919), 215 S. W. 866.

55. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex., 1919), 215 S. W. 866.

certificate made out by a stock yards company, and furnished a witness, was improperly admitted in evidence, where there was no testimony from anyone who had any connection with its making to show that it correctly stated the facts recited therein.<sup>56</sup> Where plaintiff offered an unloading certificate in evidence, it became his own evidence, subject to any legal objections as to its introduction, although brought out by cross-interrogatories propounded by defendant, who did not offer it.<sup>57</sup> A railroad's record, made under the supervision of its car accountant, showing the daily movement of trains, and composed of reports of car checkers over the system, held inadmissible, unlike train sheets, as incompetent to show the movement of trains.<sup>58</sup> In action for injuries by fire from locomotive, evidence of sparks and cinders from the locomotive was competent notwithstanding evidence of the use of spark arresters and spark arresting appliances, upon question of efficiency of spark arresters, particularly in view of evidence that the locomotive was not equipped with the best spark arresters in general use at such time.<sup>59</sup> In action for damages based on delay in transportation and alleged negligence of defendant railway in failing to properly shower and wet a certain carload of hogs, evidence concerning apparent condition of car and hogs when received at the stockyards, the des-

56. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex., 1919), 215 S. W. 866.

57. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex., 1919), 215 S. W. 866.

58. *Hudgins Produce Co. v. Missouri Pac. R. Co.* (Ark., 1919), 215 S. W. 606.

59. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia., 1919), 172 N. W. 471, 473.

In action for injuries by fire from a locomotive, evidence of prior fires was inadmissible to prove notice to railroad of inflammable ma-

terials on right of way by reason of complaint made to chief clerk, in absence of showing of extent of chief clerk's authority. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia., 1919), 172 N. W. 471, 473.

Evidence that a locomotive alleged to have caused the fire in question emitted sparks and cinders seventeen days before the fire was competent, being evidence of defective condition of locomotive, which will be presumed to have continued to exist. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia., 1919), 172 N. W. 471, 473.

tionation, was competent.<sup>60</sup> The rule that, when part of a writing is given in evidence by one party, the whole on the same subject may be introduced by the other, is subject to the limitation that no more of the remainder than concerns the same subject and is explanatory of the portion admitted is receivable.<sup>61</sup> The improper admission of testimony on an essential point of fact does not furnish ground for reversal, where another witness properly testified to the same fact.<sup>62</sup> Reception of evidence in rebuttal, which in strictness should have been evidence in chief, will be presumed on appeal to be nonprejudicial, where no application was made below for leave to meet the testimony.<sup>63</sup> Where testimony adduced in rebuttal should in strictness have been testimony in chief, court will not reverse judgment by reason thereof, in absence of a strong showing of abuse of discretion and prejudice.<sup>64</sup> An objection to evidence as irrelevant is sufficient where the irrelevancy appears from the evidence itself.<sup>65</sup>

### Judicial Notice.<sup>66</sup>

### Questions for Jury.<sup>67</sup>

60. *Lerum v. Chicago, M. & St. P. Ry. Co.* (N. Dak. 1919), 172 N. W. 878.

61. *Southern Pac. Co. v. Stephany*, 255 Fed. 679.

62. *Sugarland Ry. Co. v. Daw Bros.* (Tex., 1919), 212 S. W. 190.

63. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia., 1919), 172 N. W. 471, 473.

64. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia., 1919), 172 N. W. 471, 473.

65. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia., 1919), 172 N. W. 471, 472.

66. A court will not judicially know that a connecting carrier in handling through shipment acts as the agent and employe of carrier

from whom it receives shipment, and not as an independent carrier. (State shipment). *Ft. Worth & R. G. Ry. Co. v. Jones*, 212 S. W. 552.

The courts take judicial notice of city ordinances. *Stevenson & Co. v. Hartman*, 181 N. Y. S. 465.

67. Duplicate bills of lading and shipping receipts and evidence regarding measurements and calculations at destination held to make a jury question whether gasoline had been lost in transit by defendant carrier. *Coad v. Pennsylvania Ry. Co.* (Ia., 1919), 175 N. W. 344.

Duplicate bills of lading and receipts held to make a jury question regarding amount of gasoline delivered to defendant carrier. *Coad v. Pennsylvania Ry. Co.* (Ia., 1919), 175 N. W. 344.

In an action for injuries to horses and mules in transit, whether instances of fighting testified to by the carrier's witness were sufficient to absolve it from liability on the theory the fighting brought about the damage held for the jury. *Louisville & N. R. Co. v. Hunter* (Ky., 1919), 214 S. W. 914.

In an action against a carrier for damage to horses and mules in transit, three mules, valued at \$250 to \$300 each, having died, and a depreciation in value of other mules from \$40 to \$60 each having been testified to, verdict for the shippers for \$1,200 held not excessive. *Louisville & N. R. Co. v. Hunter* (Ky., 1919), 214 S. W. 914.

Conflicting evidence as to whether there was delay in transportation of live stock makes case for the jury. *Missouri Pac. R. Co. v. Block* (Ark., 1920), 218 S. W. 682.

Allowances made by a jury in excess of plaintiff's written demand upon the carrier reduced, and the judgment modified and affirmed. *Caston v. Schaff* (Kans., 1919), 185 Pac. 33.

In live stock shipper's action against railroad to recover charge for extra feed necessitated by delay in transportation, statement by witness that necessity for extra feed was caused by the stock standing in the cars at point of delay held a mere conclusion. *Kansas City, M. & O. Ry. Co. of Texas v. Cliett* (Tex., 1919), 216 S. W. 682.

Where there is a material issue which the court does not submit, a party desiring the submission of such issue is entitled to request its submission in writing, and although the requested issue may not

be strictly correct, yet, if as tendered it be sufficient to call the trial court's attention to its failure to charge on the issue, it should frame one and correctly submit the issue to the jury; but, where the trial court charges on or submits a material issue which is not correct or full enough, the complaining party should frame a charge or special issue that is correct, and, if the court then refuses to give such correct charge or special issue its refusal would be reversible error. *Western Union Telegraph Co. v. Goodson* (Tex., 1920), 217 S. W. 183.

Though the state statutes contemplate that each issue of fact be submitted separately, where two matters of fact are combined in one issue submitted to the jury, and one of them is not in reality an issue of fact, on account of the undisputed testimony thereon, there is no reversible error. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex., 1919), 217 S. W. 208.

In an action against a railroad for damage to, and shrinkage in weight of, cattle in transit, it was for the jury to say whether the railroad had discharged its burden, under Public Service Commission Act, § 40, to show delay in transit was not caused by its negligence. *Cunningham v. Chicago & A. R. Co.* (Mo., 1919), 215 S. W. 5 (state shipment).

In an action against a railroad company for the value of burnt cotton, which was destroyed while in transit, the question whether the cotton was on fire at the time of the shipment, or whether it caught on fire while in transit, held one

of fact for the injury. *Southern Ry. Co. v. Pettit*, 257 Fed. 663.

An assignment of error, in a suit by a shipper against carriers for a shipment of cabbage damaged, to a certain paragraph of a charge, which does not show what such paragraph contained and is not followed by any statement as to what such paragraph contained, cannot be considered on appeal. *Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son*, 212 S. W. 530.

On appeal in an action where there were several defendants, and where a deposition was filed prior to the convening of the full term of court, on the first day of which the court entered an order to the effect that service in said cause was not complete, and the cause was continued until the next term of court, it will be assumed, in support of a ruling of the court overruling a motion to suppress the deposition, made by all the defendants jointly at the second term of court, that at least part of the defendants were required to answer at the first term of court. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex., 1919), 215 S. W. 866.

Assignment with reference to argument of counsel will be overruled, where there is nothing in the record to show any such argument as complained of, though there is a statement in motion for new trial that such argument was made. *Southwestern Telegraph & Telephone Co. v. Riggs* (Tex., 1919), 216 S. W. 403.

In an action for injuries to horses in transit, where two issues of negligence were submitted to jury, one allowing recovery for an improper

element of damage, and jury found for plaintiff on both, and in response to another special issue awarded lump sum as damages, there must be a reversal and a new trial. *Gulf C. & S. F. Ry. Co. v. Culwell* (Tex., 1919), 216 S. W. 457.

In an action for loss by fire of cotton shipped, admission in evidence of bills of lading covering consignments not embracing cotton in suit held harmless to railroad, in view of fact jury merely passed on value of cotton at time of destruction, and were not asked to determine whether or not it had been received by railroad for shipment. *Sugarland Ry. Co. v. Dew Bros.* (Tex., 1919), 212 S. W. 190.

In an action against the terminal carrier of an interstate shipment of onion sets to recover damage by wetting in transit, evidence held sufficient to raise the issue as to whether or not some of the damage occurred before the sets came upon the terminal carrier's line. *Houston & T. C. R. Co. v. Reichardt & Schulte Co.* (Tex., 1919), 212 S. W. 208.

In an action against railroad for damages to horses from watering them too soon after leaving the train, evidence of plaintiff as to the extent of his damages held of such an inconsistent and varying character that the jury was justified in disregarding it. *Cogley v. Chicago, B. & Q. R. Co.* (Ia., 1919), 171 N. W. 745.

Where a shipper claims damages for injury to horses stopped in transit, and which he claims had been prematurely watered, and on the trial his testimony as to the measure of damages is very great-

ly exaggerated, the jury may be justified in disregarding the testimony entirely. *Cogley v. Chicago, B. & Q. R. Co.* (Ia., 1919), 171 N. W. 745, 746.

In an action against railroad for damages to live stock, an item of damages pertaining to a horse with an injured knee, the evidence relied on by plaintiff in support of such item being a mere guess, was properly withdrawn by the court as not having sufficient support in evidence. *Cogley v. Chicago, B. & Q. R. Co.* (Ia., 1919), 171 N. W. 745.

In an action against a railroad for destruction by fire in transit of cotton shipped over its line, question of value of cotton held for the jury. *Sugarland Ry. Co. v. Dew Bros.* (Tex., 1919), 212 S. W. 190.

In an action against a carrier for damages to cattle, an instruction submitting a special issue as to whether the cattle died as a proximate result "of such negligence" was not erroneous in assuming negligence, where the jury were told not to answer the question unless they had found the carrier guilty of negligence in answering a previous question. *Galveston, N. & S. A. Ry. Co. v. Harris Bros.* (Tex., 1919), 211 S. W. 255.

In an action against carrier for damages to mules in transit, there having been intrinsic value of the mules at destination after injuries, it should have been shown what the value was before damages could have been legally awarded. *Gulf C. & S. F. Ry. Co. v. Helms Bros.*, 210 S. W. 853.

In an action against a carrier for negligent loss of goods, whether the lost goods, which were left in a car on a siding by plaintiff, who

had removed part of the goods therefrom, were delivered to plaintiff held for jury. *Grand Trunk & Western R. R. v. Glinski* (Ind., 1919), 125 N. E. 53 (state shipment).

In an action against an express company by the consignee for loss and depreciation of a shipment of horses, whether the horses had contracted colds or pneumonia or purpura through the company's negligence, as alleged in the declaration and set forth in the specifications, held a question of fact. *Clapp v. American Express Co.* (Mass., 1919), 125 N. E. 163.

In an action against carrier for nondelivery of goods, evidence having tendency to show that incorrect destination was defendant's fault, or that agent knew of destination intended, held sufficient to take case to jury. *James v. Alabama Great Southern R. Co.* (Ala. 1919), 81 So. 582.

In a shipper's action for damage to fruit resulting from carrier's failure to re-ice car, evidence held to justify submission of question of carrier's negligence to jury. *Bobzein v. New York Cent. Co.*, 176 N. Y. S., 406.

In an action for delay in delivery of live stock shipment, where there was no testimony of any contract by the carrier to transport the shipment to place of its destination, the court erred in submitting that issue to the jury and authorizing a recovery thereon. (State shipment.) *Ft. Worth & R. G. Ry. Co. v. Jones* (Tex. 1919), 212 S. W. 552.

The rule that, where there is no dispute about the material facts, the question of reasonable time in which the goods should have been removed from the carrier's warehouse by the

**Argument and Motions.<sup>68</sup>****Instructions, Verdict and New Trial.<sup>69</sup>**

consignee is one of law for the court has no application, where the consignees of the goods were bound by the custom of the railroad to make delivery at the warehouse of a compress company. *Wichita Valley Ry. Co. v. Golden* (Tex. 1919), 211 S. W. 465.

68. A general motion made by several defendants jointly to strike out depositions filed before a prior term of court was properly overruled, where part of the defendants were required to answer at the prior term of court, but made no motion to suppress at that time. *Panhandle & S. F. Ry. Co. v. Clarendon Grain Co.* (Tex. 1919), 215 S. W. 866.

A court properly refused a continuance on the ground of absence of witness, where trial was held almost three years after original petition was filed, and witness was not subpoenaed until two days before trial, and no explanation was given for delay. *Texas & N. O. R. Co. v. Pipkin*, 209 S. W. 757.

69. Refusal to submit defense that shipper failed to unload cattle after sudden stop in an effort to diminish or mitigate the damages was not error, where there was no definite evidence that to have so unloaded the cattle would have resulted in any material benefit to them, nor that any definite injury which could be measured by delays properly resulted by failure to so unload. *Panhandle & S. F. Ry. Co. v. Sanderson* (Tex. 1920), 218 S. W. 540.

In an action against railroad com-

pany for value of cotton destroyed by fire while in its possession as carrier, where evidence tended to show delivery to compress company, shipper's agent to accept delivery before the cotton was burned, peremptory instruction to find for the railroad was erroneous. *Illinois Central R. Co. v. Pettit*, 257 Fed. 663.

In an action for injuries to a shipment of cattle, it was error to refuse to submit affirmatively the issue requested by defendants as to whether the damage complained of was the sole result of the cattle being too poor or weak to stand ordinary transportation from M. to F., though it was submitted inferentially and in a negative form in other issues. *Galveston, H. & S. A. Ry. Co. v. Crowley* (Tex. 1919), 214 S. W. 721.

In an action against a railroad for damage to a shipment of sheep by delay, in view of the charge as a whole, special issue whether the sheep sustained damage as a proximate result of delays in transportation, which defendant railroad or any of its connecting carriers could have avoided by ordinary care, held not erroneous as assuming delays were caused by defendant's negligence. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex. 1919), 217 S. W. 208.

In an action against a railroad for damages to a shipment of live stock, the instruction that mere delay, of itself, was no evidence of negligence, without explanation and qualification of what was meant by mere delay,

was properly refused, as contrary to Public Service Commission Act, § 40 (Rev. St. 1909, § 3121, as amended by Acts 1913, p. 177). *Cunningham v. Chicago & A. R. Co.* (Mo. 1919), 215 S. W. 5. (State shipment.)

An instruction embraced in others given for the party was properly refused. *Cunningham v. Chicago & A. R. Co.* (Mo. 1919), 215 S. W. 5. (State shipment.)

Where the damages recoverable in an action for negligence are not clearly and fully shown so as to be ascertained with reasonable certainty, a judgment on a verdict apparently in excess of the damages properly recoverable will be reversed for a new trial. *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559.

A trial judge may amend an order made under the statute extending the time for making and presenting a motion for new trial, so as to make the order express the judicial intent to comply with the statute. *Florida East Coast Ry. Co. v. Peters* (Fla. 1919), 83 So. 559.

If an instruction as modified was worded so as not to accurately submit a question, evidently intended, particular attention should have been called thereto by specific objection. *Missouri Pac. R. Co. v. Block* (Ark. 1920), 218 S. W. 682.

Where a carrier accepted for shipment burnt cotton that had been salvaged, and the bill of lading acknowledged the receipt of the shipment in apparent good order and free from fire, and there was evidence that it had been free from fire five days previous, there is a presumption that the failure of the carrier to deliver the cotton which burned during transit was due to its fault, and re-

fusal to charge that before the shipper might recover he must show some evidence of negligence on part of the carrier was proper. *Southern Ry. Co. v. Pettit*, 257 Fed. 663.

Where burnt cotton, which had been salvaged, was destroyed while in transit, and no inherent defect or vice was suggested, except the existence of smouldering fire, and that was fully covered by the charge, the refusal of a request that there could be no recovery if the fire originated because of inherent defect or vice of cotton will not be considered on appeal; no assignment of error having been taken, and the case not being one where the court should, under rule 11 (202 Fed. viii, 118 C. C. A. viii), review the ruling without an assignment. *Southern Ry. Co. v. Pettit*, 257 Fed. 663.

The verdict of a jury giving a claimant damage for two days' delay in a shipment of cabbage upheld. *Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son*, 212 S. W. 530.

In a suit by a shipper for cabbage damaged, refusal of instruction asked by initial carrier as to the freezing of the cabbage was not error, where there was no evidence tending to show that the cabbage had frozen. *Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son*, 212 S. W. 530.

Refusal of an instruction requested by initial carrier in suit by shipper for shipment of cabbage damaged as to time of shipment required from S. in Texas to S. in Missouri was proper; such charge being directly upon the weight of the evidence, which was a matter for the jury. *Rio Grande & E. P.*

Ry. Co. v. J. H. Russell & Son, 212 S. W. 530.

In an action for loss of and damage to live stock in transit, the court, having in effect instructed that before plaintiff shipper could recover he must show that the loss or damage occurred on the line of defendant railroad, while the stock was in its possession, was not required to multiply instructions on the same point. *Missouri Pac. R. Co. v. Hill* (Ark., 1919), 215 S. W. 676.

In an action against a railroad for loss of and damage to live stock in transit, instruction, that plaintiff shipper to recover must show by a preponderance of testimony that the cattle after delivery to defendant railroad were negligently handled, held not erroneous as giving plaintiff the right to recover if the proof showed the damage occurred after the cattle were received by defendant railroad, though inflicted by the delivering carrier. *Missouri Pac. R. Co. v. Hill* (Ark., 1919), 215 S. W. 676.

Where both parties request peremptory instructions and do nothing more, they assumed the facts to be undisputed and submit to the judge the determination of the inferences to be drawn therefrom. *Oil Trough Gin Co. v. Director General of Railroads* (Ark., 1919), 216 S. W. 310.

Where a shipper introduced evidence tending to show that cotton seed weighed a certain amount when loaded for shipment, but also showed a smaller weight secured at destination before delivery to the consignee, held, that there was a conflict as to the weight of the cotton seed shipped supporting a

directed verdict for defendant. *Oil Trough Gin Co. v. Director General of Railroads* (Ark., 1919), 216 S. W. 310.

In a shipper's action for injuries to live stock, it was not error to refuse to instruct that defendant was not liable for injuries occurring while the cattle were being switched by another road at destination, where such road was not acting as a connecting carrier, but as defendant's agent to do the switching. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Tex., 1919), 212 S. W. 981.

In a shipper's action for injuries to shipment of live stock, error in refusing to charge that defendant was not liable for damages accruing during switching operations by the agent of a connecting carrier was harmless, where it appeared that no damages were assessed against defendant for injuries incurred during the switching operation. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Tex., 1919), 212 S. W. 981.

Where in a shipper's action against connecting carriers a proper instruction is not sufficiently clear that damages are to be assessed separately, a special charge to that effect must be requested. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Tex., 1919), 212 S. W. 981.

In an action by a shipper of live stock against an initial carrier, it was not error to refuse a peremptory instruction for defendant, where there was evidence to show that some damage was inflicted to the shipment upon defendant's line, for which it would be liable (state shipment). *Chicago, R. I. & G. Ry.*

Co. v. Hallam (Tex., 1919), 211 S. W. 809.

In an action for damages to a shipment of live stock brought against connecting carriers, where the findings of the jury required a judgment against all the defendants, it was fundamental error to render a judgment against one alone, since a judgment must conform to the facts found by the jury; and, while the court may set such findings aside, it cannot render judgment contrary thereto (state shipment). *Chicago, R. I. & G. Ry. Co. v. Hallam* (Tex., 1919), 211 S. W. 809.

In an action against carrier for damages to hogs, where there could not have been any other proper verdict than that returned, it was immaterial that the court erred in its charge upon the measure of damages. *Lancaster v. Pitzer* (Tex., 1919), 211 S. W. 313.

In a shipper's action for injuries to a shipment of live stock, it was not error to refuse to instruct that there was no evidence of the kind or character of the animals killed, and in no event to find value in excess of the cheapest grade of animals in the shipment, where there was evidence that the dead animals were an average of the shipment. *Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero* (Tex., 1919), 212 S. W. 981.

Refusal to give instruction that would have cured error in the admission of evidence based on erroneous measure of damages was error. *International Harvester Co. v. Chicago, M. & St. P. Ry. Co.* (Ia. 1919), 172 N. W. 471, 473.

"Proximate cause" consists of a reasonably close physical causal con-

nection between the negligence and the injury claimed, so that it can be seen that but for the negligence the injury would probably not have resulted, and negligence of such a character that an ordinarily prudent person may reasonably foresee that an injury to another might follow from it. *Bell Lumber Co. v. Bayfield Transfer Ry. Co.* (Wisc. 1919), 172 N. W. 955.

In an action against a carrier for damages to shipment of cattle, the court's instruction that: "'Negligence' means that failure to exercise ordinary care. 'Ordinary care' means the doing of that which an ordinarily prudent man would do under the same or similar circumstances or not doing that which under the same or similar circumstances an ordinarily prudent man would not do"—as applied to handling of stock, held substantially correct. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Tex. 1919), 211 S. W. 255.

In an action against a carrier for damages to hogs, it was not necessary to give a charge upon the measure of damages, where the cause was submitted upon special issues. *Lancaster v. Pitzer* (Tex. 1919), 211 S. W. 313.

In an action against carrier for injuries to mules in transit, instruction that common carrier is not an insurer of live stock received by it for transportation, but responsible only if careless and negligent, etc., held improper, on account of the use of the word "careless." *Gulf, C. & S. F. Ry. Co. v. Helms Bros.*, 210 S. W. 853.

In an action against a railway for conversion of cotton, a judgment for plaintiff cannot stand, where there is no proof that the cotton was ever de-

livered to the railroad, or any evidence concerning the quality or weight of the cotton. *Texas & N. O. Ry. Co. v. Spencer*, 210 S. W. 989.

It was no ground for peremptory instruction to return verdict for defendant that claim sued on in name of firm belonged to members jointly that one was dead, having left an estate, a widow, and two minor children, and that no administration had been had, while neither his heirs nor legal representatives were made parties plaintiff. *Gulf, C. & S. F. Ry. Co. v. Helms Bros.* 210 S. W. 853.

Where shipper of stallion suing for his death caused by failure to transport as expeditiously as required by statute by his instructions not only broadened issues, but abandoned cause of action for failure to transport as expeditiously as required and substituted a cause of action based on railroad's common-law duty to transport without delay and within a reasonable time, there was error. *Strother v. Atchison, T. & S. F. Ry. Co.*, 212 S. W. 404.

Under the state law, plaintiff's failure, in a suit against a carrier for damages to an interstate shipment, to object to a charge submitting the issue of negligence, waived any errors committed in such submission. *Nabors v. Colorado & S. Ry. Co.* (Tex. 1919), 210 S. W. 276.

Where the facts were stipulated between parties, and both requested a directed verdict, the failure of the court, in directing a verdict for plaintiff, to state his reason therefor, was not prejudicial error. *Winget v. Grand Trunk Western Ry. Co.* (Mich. 1920), 177 N. W. 273.

It was proper to refuse a peremptory instruction for defendant, where evidence favorable to plaintiff and reasonable inferences which the jury is permitted to draw therefrom support plaintiff on the essential elements of either paragraph of the complaint. *Jackson v. Mauck* (Ind. 1920) 126 N. E. 861.

Where there was some evidence to support plaintiff's cause on every material issue, this court cannot weigh the evidence, but must accept as true that which supports the verdict. *Jackson v. Mauck* (Ind. 1920), 126 N. E. 851.

It was an error to return instructions requested by defendants, even if they were correct and applicable to the facts, where they were substantially covered by the court's charge. *Barry et. al. v. Los Angeles & S. L. R. Co. et. al.* (Utah 1920), 189 p. 71.

Where an instruction on measure of damage for fruit injured in shipment stated at the beginning as an element the value in the damaged condition if jury found they were damaged, the omission of the latter words in later references to the damaged condition could not have misled the jury, and was not prejudicial error, reading the instructions as a whole. *Barry et. al. v. Los Angeles & S. L. R. Co. et. al.* (Utah 1920), 189, p. 70 and 71.

Where the issue whether there was a market value for fruit at place of destination was otherwise submitted to the jury, an instruction, stating the measure of damages as the difference between the market value in good condition and such value after damage at the place of destination, and enumerating elements on which such value could be determined, was not erroneous as assuming that the fruit

**Costs.<sup>70</sup>**

**Appeal.<sup>71</sup>** Effect must be given to the trial judge's rulings as to the evidentiary weight of selected parts of the testimony,

had a market value at the place of destination. *Barry et. al. v. Los Angeles & S. L. R. Co. et. al.* (Utah 1920), 189, p. 70.

In action against express companies for negligence, a finding by the jury that the S. Company, which transported the butter, is not liable for the loss, is inconsistent with a finding that the A. Company, which was organized subsequently to the loss and succeeded to the business of the S. Company, is liable, and cannot support a judgment against the A. Company. *King Grocery Co. v. Southern Express Co.*, 100 S. E. 325.

In an action for damages to a shipment of shelled corn delayed in transit, refusal of defendant's requested instruction that it is the duty of a common carrier to transport with reasonable dispatch, but it cannot be held liable for delay through conditions which it cannot control, held not reversible error; the road not having excepted to the instruction as modified and given. *Pittsburgh, C., C. & St. L. Ry. Co. v. Home Ins. Co.* (Ind., 1919), 125 N. E. 426.

A motion for nonsuit must state the particular grounds, and a motion therefor because plaintiff had failed to prove any negligence of defendants, and had failed to prove any damages, is too general. *Barry et. al. v. Los Angeles & S. L. R. Co. et. al.* (Utah, 1920), 189, p. 71.

In an action against railroad company for injury to cotton crop

resulting from delay in delivery of fertilizer, requested instructions on burden of proof, demeanor of witnesses, and weather conditions as affected crop, were properly refused, where substantially given in charge. *Gatlin et. al. v. Norfolk Southern R. Co. et. al.* (No. Car., 1920), 102 S. E. 779.

In an action to recover from a carrier damages to shipment of live stock, an assignment of error for reading from a deposition a statement that train crew attributed the rough handling of the train to inefficiency or lack of interest on the part of the engineer held not reversible error. *Galveston, H. & S. A. Ry. Co. v. Harris Bros.* (Tex., 1919), 211 S. W. 255.

70. Under Code Civ. Proc. § 3066, par. 5, respondent whose judgment was affirmed only in part was entitled to \$10 costs and disbursements. *Gifford v. Fargo*, 176 N. Y. S. 568.

71. Court on appeal will presume that jury followed court's instruction to disregard improper remarks of counsel, unless the contrary is made to appear. *Kansas City, M. & O. Ry. Co. of Texas v. Cliett* (Tex., 1919), 216 S. W. 682.

Where assignments of error are confined to bill of exceptions but cover matters other than sufficiency of the evidence to sustain verdict, a motion for new trial is not essential to a consideration of the asserted errors duly assigned that

though he might have refused to give the requests for such rulings.<sup>72</sup> Rulings which the trial judge gave at defendant's request must be accepted as stating the law of the case for the purpose of passing on defendant's exceptions.<sup>73</sup> The Supreme Court must accept as true evidence for defendant which the trial judge improperly excluded and then directed verdict for plaintiff.<sup>74</sup> The question as to whether a cross-bill presented matter purely of common-law jurisdiction and not of equity

do not go to sufficiency of the evidence to support verdict and judgment. *Florida East Coast Ry. Co. v. Peters* (Fla., 1919), 83 So. 559.

Under the state law the Supreme Court is not authorized to reverse the case if the error committed, as defects in the form of instructions, does not affect the merits of the action. *Cunningham v. Chicago & A. R. Co.* (Mo., 1919), 215 S. W. 5 (state shipment).

If the verdict can be sustained by legal evidence as to any act of negligence on the part of defendant carrier, it is the duty of the Court of Civil Appeals to do so. *Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter* (Tex., 1919), 217 S. W. 208.

Rulings called to the attention and passed on by the trial court will be reviewed on appeal without being incorporated in a motion for new trial. *Gibson v. Adams Express Co.* (Ia., 1919), 175 N. W. 331.

Where records were used as bases for testimony of witness, no objection being made that the records were unidentified and unverified, no complaint can be made on appeal on that ground. *Missouri Pac. R. Co. v. Bradley* (Ark., 1919), 215 S. W. 668.

Where court on appeal concludes that great preponderance of the evidence shows verdict to be excessive, but cannot determine to what extent it is excessive, court will reverse judgment and remand cause. *Baker v. Nance*, 211 S. W. 615.

The superior court's decisions on motions to set aside a verdict as against the weight of the evidence and because damages were excessive are not reviewable in the Supreme Court. *Gatlin et. al. v. Norfolk-Southern R. Co. et. al.* (No. car. 1920), 102 S. E. 779.

In shipper's action for damage to live stock from negligent delay in transportation, carrier cannot complain, on appeal, of instruction basing shipper's right to recover upon unreasonable delay by carrier; such instruction being, in view of carrier's responsibility as insurer, favorable to carrier. *Missouri Pac. R. Co. v. Martindale* (Ark., 1919), 213 S. W. 777.

72. *Noble v. American Express Co.* (Mass. 1920), 125 N. E. 598.

73. *Noble v. American Express Co.* (Mass. 1920), 125 N. E. 598.

74. *Illinois Central R. Co. v. Threefoot Bros. & Co.* (Miss. 1919), 83 So. 635.

jurisdiction cannot arise on appeal, where no such objection was made below.<sup>75</sup> On reviewing the directing of a verdict evidence which should have been received is treated as received.<sup>76</sup> If there was any evidence justifying a finding, judgment based thereon cannot be disturbed.<sup>77</sup> The Supreme Court must presume that the verdict of the jury was based on testimony of a substantial character.<sup>78</sup> The question of jurisdiction of the subject-matter can be raised at any time in any court, and may be considered by the Supreme Court on appeal.<sup>79</sup> In an action against several connecting carriers for damages to fruit shipment occasioned by negligent failure to keep the drains of refrigerator cars open, in which each defendant may have participated, where all defendants answered jointly and participated jointly in the trial, they could not, for the first time, on appeal, urge that a nonsuit should have been directed because plaintiff failed to show which carrier's negligence caused the injury.<sup>80</sup>

75. *Schaff v. Kahn & Bernstein* (Miss. 1920), 83 So. 622.

Under the Iowa Code, exceptions and objections to instructions filed after verdict will not be reviewed unless the error was presented to the trial court for correction by motion, for new trial. *Gibson v. Adams Express Co.* (Ia. 1919), 175 N. W. 331.

Rulings of the lower court complained of on appeal will be reviewed and considered only if it appears from the record that they were called to the attention of and passed on by the trial court, and proper exceptions taken and preserved thereto. *Gibson v. Adams Express Co.* (Ia. 1919), 175 N. W. 331.

A waiver of a right not pleaded cannot be urged for the first time on appeal. *Western Union Telegraph Co. v. Janako* (Tex. 1919), 212 S. W. 243.

Only rulings to which exceptions were duly taken can be reviewed by the appellate court. *Southern Pac. Co. v. Stephany*, 255 Fed. 679.

76. *Coad v. Pennsylvania Ry. Co.* (Ia. 1919), 175 N. W. 344.

A federal question, not asserted in the answer filed in the state court, or even in the assignment of error in the Supreme Court, cannot be considered. *So. Pac. Co. v. Arizona*, 39 Sup. Ct. 313.

77. *Salisbury & Western Union Telegraph Co.* (Mo. 1919), 217 S. W. 551.

78. *Missouri Pac. R. Co. v. Hill* (Ark. 1919), 215 S. W. 676.

79. *Petition of Southern Lumber & Mfg. Co.*, 210 S. W. 630.

80. *Barry et. al. v. Los Angeles & S. L. R. Co. et. al.* (Utah 1920), 189, p. 71.

Where the effect of an act of Congress has not been authoritatively settled by the Supreme Court of the United States, the Court of Civil Appeals will follow the decisions of the state Supreme Court.<sup>81</sup>

81. *Western Union Tel. Co. v. Kilgore* (Tex. 1920), 220 S. W. 593.

## CHAPTER XI.

### TELEGRAPH COMPANIES IN GENERAL.

Telegraph companies are liable at common law for their negligence in failing to correctly transmit and deliver a message.<sup>1</sup> The Interstate Commerce Act, as amended in 1906 and 1910, which latter amendment declared that the act should extend to telegraph, telephone, and cable companies, and provided that messages might be classified into day, night, repeated, un-repeated, letter, commercial, press, government, and such other classes as are just and reasonable, does not, in view of section 22, as well as sections 8, 9, warrant a telegraph company in limiting its liability for negligence in the transmission of an un-repeated interstate message to the amount received for sending the same by providing for repeating of messages and a system of insurance; the latter provisions being contrary to public policy and intended to increase the revenues of the telegraph company by unwarranted exactions. Hence a telegraph company is liable for negligence in the transmission of an un-repeated interstate message.<sup>2</sup> The receiver of a telegram not being bound

1. *Western Union Telegraph Co. v. Hanlin* (Ind. 1919), 125 N. E. 45.

2. *Bowman & Bull Co. v. Postal Telegraph Cable Co.* (Ill. 1919), 124 N. E. 851.

In *Postal-Telegraph Cable Co. v. Warren-Godwin Lumber Co.*, 40 Sup. Ct. 69, the court said:

"In *Primrose v. Western Union Telegraph Company*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 833, the court passed upon the validity of a contract made by a telegraph company with the sender of a message by which, in case the message was missent, the lia-

bility of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was not one exempting the company from liability for its negligence, but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance. Such a contract was therefore decided to be

valid and the right to recover for error in transmitting a message which was sent subject to it was accordingly limited.

In *Western Union Telegraph Company v. Showers*, 112 Miss. 411, 73 South. 276, the Supreme Court of that state was called upon to consider the validity of a contract by a telegraph company limiting its responsibility for missending an unrepeatd message essentially like the contract which was considered and upheld in the *Primrose Case*. The court decided that as the Act of Congress of June 18, 1910, c. 309, 36 Stat. 539, 545, had operated to exert the power of Congress over telegraph companies as to their interstate business and contracts, Congress had taken possession of the field and thus excluded state legislation and hence such a contract was valid and enforceable in accordance with the rule laid down in the *Primrose Case*. In holding this, however, the court pointed out that but for the act of Congress a different rule would apply, as under the state law such a contract was invalid because it was a stipulation by a carrier limiting its liability for its negligence.

In *Dickerson v. Western Union Telegraph Company*, 114 Miss. 115, 74 South. 779, the validity of a like contract by a telegraph company for the sending of an unrepeatd message once again arose for consideration. In passing upon it the court declared that the ruling previously made in the *Showers Case*, as to the operation of the act of Congress of 1910, was erroneous. Coming therefore anew to reconsider that subject, it was held that the act of Congress of 1910 had not extended the power of Congress

over the rates of telegraph companies for interstate business and the contracts made by them as to such subject, and hence the *Showers Case*, in so far as it held to the contrary, was overruled. Thus removing the contract from the operation of the national law and bringing it under the state law, the court held that the contract was void and not susceptible of being enforced because it was a mere contract exempting the telegraph company from the consequences of its negligence.

The case before us involving the extent of the liability of the Telegraph Company for an unrepeatd interstate message governed by a contract like those considered in the previous cases, was decided by a state circuit court after the decision in the *Showers Case* and before the overruling of that case by the *Dickerson Case*. Presumably therefore the court, because of the *Showers* decision upheld the validity of the contract and accordingly limited the recovery. The appeal which took the case to the court below, however, was there heard after the decision in the *Dickerson Case*. In view of that situation the court below in disposing of the case expressly declared that the only issue which was open was the correctness of the ruling in the *Dickerson Case*, limiting the operation and effect of the act of Congress of June 18, 1910. Disposing of that issue, the ruling in the *Dickerson Case* was reiterated and the contract, although it concerned the transmission of an interstate message, was declared not affected by the act of Congress and to be solely controlled by the state law and to be therefore void. That subject, presents then, the only federal

question, and indeed the only question in the case.

For the sake of brevity, we do not stop to review the cases which perturbed the mind of the court below in the Dickerson Case as to the correctness of its ruling in the Showers Case (*Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *Western Union Telegraph Company v. Crovo*, 220 U. S. 346, 31 Sup. Ct. 399, 55 L. Ed. 498; *Adams Express Company v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Western Union Telegraph Company v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457), but content ourselves with saying that we are of opinion that the effect which was given to them was a mistaken one. We come at once therefore to state briefly the reasons why we conclude that the court below mistakenly limited the act of Congress of 1910 and why therefore its judgment was erroneous.

In the first place, as it is apparent on the face of the act of 1910 that it was intended to control telegraph companies by the act to regulate commerce, we think it clear that the act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws.

In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the act to regulate commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeatd telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since as pointed out in the Primrose Case the right to contract on such subject was embraced within the grant of the primary rate-making power.

In the third place, as the act expressly provided that the telegraph, telephone or cable messages to which it related may be "classified into day, night, repeated, unrepeatd, letter, commercial, press, government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages," it would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission (*Clay County Produce Company v. Western Union Telegraph Company*, 44 Interst. Com. R. 670), from the very inception of the telegraph business, or at least for a period of 40 years before 1910, the unrepeatd message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

But we need pursue the subject no further, since, if not technically au-

thoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same subject (*Gardiner v. Western Union Telegraph Company*, 231 Fed. 405, 145 C. C. A. 399); and by the numerous and conclusive opinions of state courts of last resort which in considering the act of 1910 from various points of view reached the conclusion that that act was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefor was an occupation of the field by Congress which excluded state action (*Western Union Tel. Co. v. Bank of Spencer*, 53 Okl. 398, 156 Pac. 1175; *Haskell Implement Co. v. Postal Tel.-Cable Co.*, 114 Me. 277, 96 Atl. 219; *Western Union Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91; *Bailey v. Western Union Tel. Co.*, 97 Kan. 619, 156 Pac. 716; *Durre v. Western Union Tel. Co.*, 165 Wis. 190, 161 N. W. 755; *Western Union Tel. Co. v. Schade*, 137 Tenn. 214, 192 S. W. 924; *Meadows v. Postal Tel.-Cable Co.*, 173 N. C. 240, 91 S. E. 1009; *Norris v. Western Union Tel. Co.*, 174 N. C. 92, 93 S. E. 465; *Bateman v. Western Union Tel. Co.* 174 N. C. 97, 93 S. E. 467, L. R. A. 1918A, 803; *Western Union Tel. Co. v. Lee*, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026; *Western Union Tel. Co. v. Foster*, 224 Mass. 365, 113 N. E. 192; *Western Union Tel. Co. v. Hawkins*, 14 Ala. App. 295, 70 South. 12).

"It is indeed true that several state courts of last resort have expressed conclusions concerning the act of Congress applied by the court below in this case. But we do not stop to review or refer to them as we are of opinion that the error in the reasoning upon which they proceed is pointed out by what we have said and by the authorities to which we have just referred."

The refusal of a state court to limit the liability of a common carrier for negligence in the execution of a contract for interstate carriage to an agreed valuation is not an unlawful regulation of interstate commerce, in the absence of congressional action providing a measure of liability different from that established by the settled law of the state, for in such cases the highest state court may administer the common law according to its own understanding, without liability to review in the federal Supreme Court, unless some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied. *Bowman & Bull Co. v. Postal Telegraph-Cable Co.* (Ill. 1919), 124 N. E. 851.

A telegraph company, which requires messages to be sent on prepaid blanks, cannot restrict its liability for negligence by a provision on the back of the blanks that it shall not be liable for mistakes unless the message is repeated and insured, etc., for to allow a telegraph company to so exonerate itself for its own negligence would be contrary to public policy. *Bowman & Bull Co. v. Postal Telegraph-Cable Co.* (Ill. 1919), 124 N. E. 851.

Where a patron of a telegraph company shows an inaccuracy in the transmission of a message, the com-

by the contract between the sender and the company, in the absence of an agreement, is not bound by a contract provision limiting the company's liability to the amount of the fee received for the sending of the message.<sup>3</sup> And the receiver of a telegram in the absence of an agreement by him to that effect is not bound by a contract between the sender and the company, and his failure to present his claim within 60 days as required by the regulations of the company is not a defense.<sup>4</sup> The Interstate Commerce Act, placing telegraph companies under the supervision of the Interstate Commerce Commission, does not supersede the jurisdiction of the state courts in any case where the decision does not involve the determination of matters calling for the exercise by the commission of administrative discretion, and therefore does not prevent an action against a telegraph company for negligence in transmission of messages.<sup>5</sup> In an action against a telegraph company based on a mistake in a message to a stock dealer quoting the price of hogs at 95 instead of 55, whereby claimant, in reliance on the correctness of the telegram delivered to him, purchased two carloads of hogs, paying therefor 40 cents a hundred more than he would otherwise have paid, the damages are not speculative.<sup>6</sup>

pany, to exonerate itself, must show how the mistake occurred, and, in the absence of such proof, want of ordinary care on the part of the company may be presumed. *Bowman & Bull Co. v. Postal Telegraph-Cable Co.* (Ill. 1919), 124 N. E. 851.

3. *Western Union Telegraph Co. v. Hanlin* (Ind. 1919), 125 N. E. 45.

4. *Western Union Telegraph Co. v. Hanlin* (Ind. 1919), 125 N. E. 45.

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# **The Loss and Damage Review**

By

**HERBERT C. LUST**

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Published by

**H. C. LUST AND COMPANY**



**STATEMENT OF THE OWNERSHIP, MANAGEMENT,  
CIRCULATION, ETC., REQUIRED BY THE  
ACT OF CONGRESS OF AUGUST 24, 1912,**

Of Loss and Damage Review, published quarterly at Chicago, Ill., for  
April 1, 1920.

State of Illinois }  
County of Cook } ss.

Before me, a Notary Public in and for the State and county aforesaid, personally appeared H. C. Lust, who, having been duly sworn according to law, deposes and says that he is the owner of the Loss and Damage Review and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, printed on the reverse of this form, to wit:

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H. C. LUST.

Sworn to and subscribed before me this 29th day of March, 1920.

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ERNA SCHILLING.

My commission expires December 11, 1920.



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